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ABBREVIATIONS EXPLAINED.

A. I. R. 1936 All.	All India Reporter, 1936, Allahabad.
A. I. R. 1936 Bom.	...	...	All India Reporter, 1936, Bombay.
A. I. R. 1936 Cal.	...	...	All India Reporter, 1936, Calcutta.
A. I. R. 1936 Lah.	...	...	All India Reporter, 1936, Lahore
A. I. R. 1936 Mad.	...	...	All India Reporter, 1936, Madras.
A. I. R. 1936 Nag.	...	...	All India Reporter, 1936, Nagpur.
A. I. R. 1936, Oudh.	...	...	All India Reporter, 1936, Oudh.
A. I. R. 1936 Pat.	...	...	All India Reporter, 1936, Patna.
A. I. R. 1936 Pesh.	...	...	All India Reporter, 1936, Peshawar.
A. I. R. 1936 Rang.	...	...	All India Reporter, 1936, Rangoon.
A. I. R. 1936 Sing.	...	...	All India Reporter, 1936, Sind.
All.	...	...	Indian Law Reports, Allahabad Series.
A. L. J.	...	...	Allahabad Law Journal.
A. W. R.	...	...	Allahabad Weekly Reporter.
Bom.	...	...	Indian Law Reports, Bombay Series
Bom. L. R.	...	...	Bombay Law Reporter.
Cal.	...	...	Indian Law Reports, Calcutta.
C. L. J.	...	...	Calcutta Law Journal.
C. W. N.	...	...	Calcutta Weekly Notes.
I. A.	...	...	Law Reports Indian Appeals.
I. C.	...	...	Indian Cases.
Lahore	...	...	Indian Law Report, Lahore Series.
Luck.	...	...	Indian Law Reports, Lucknow.
Mad.	...	...	Indian Law Reports, Madras Series.
M. L. J.	...	...	Madras Law Journal.
M. L. W.	...	...	Madras Weekly.
M. W. N.	...	...	Madras Weekly Notes.
N. L. J.	...	...	Nagpur Law Journal.
N. L. R.	...	...	Nagpur Law Report.
O. W. N.	...	...	Oudh Weekly Notes.
Pat.	...	...	Indian Law Reports, Patna Series.
P. L. T.	Patna Law Times.
Rang.	Indian Law Reports, Rangoon Series.
R. D.	Revenue Decisions.

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THE CURRENT LAW DIGEST 1936.

CIVIL CASES

ACCOUNTS.

Non-production of old books of account—Effect of.

It is impossible to say that account books would ordinarily be preserved for anything like a period of 40 years. It is more probable that after the lapse of a decade or two, such account books would not be preserved, and they may, as a matter of fact, get destroyed. No adverse presumption therefore should be drawn from the non-production of such old account books. (*Sulaiman C. J. & Bennet J.*)

GANESHI LALL vs. BHAGWAN SINGH & ORS.

1936 A.W.R. 547

ADMINISTRATION.

Administration suit—Debt alleged to be due from party but not admitted by him, if can be deemed to be assets of the deceased in his possession.

A Court, can in pursuance of a decree in an administration suit direct one of the parties to the suit to restore or hand over to the administrator or the receiver assets belonging to the estate in possession of such party. But a debt, specially a debt which is disputed is not governed by this rule. Such a debt cannot be deemed to be an asset in the possession of the debtor and

Administration—(Contd)

cannot be ordered to be delivered to the administrator. (*Jailal J.*)

AHMED DIN & ORS. vs. MOHAMMAD TAQI & ORS.

38 P.L.R 284=A.I.R. 1936 Lah 365=
163 I.C. 363

ADVERSE POSSESSION.

Guiding principles in determining the question of adverse possession.

In order to constitute adverse possession, the possession must be adequate in continuity, in publicity, and in extent of area, to show that it was adverse to the real owner. It must be actual, exclusive and uninterrupted. The kind of possession must no doubt depend largely upon the character of the land, but no presumption of possession can be made in favour of a trespasser. His possession must be confined to the land actually occupied by him. Though as a general rule possession of part is in law possession of the whole if the whole is otherwise vacant, yet constructive possession of this kind can only be presumed when there is a claim based upon title. (*Srivastava & Nanavatty J.J.*)

PARTAB BAHADUR SINGH vs. JAGAJIT SINGH.

1936 O.W.N. 784=164 I.C. 118=A.I.R.
1936 Oudh 367.

Adverse Possession—(Contd.)

Possession of co-sharer, when becomes adverse to another co-sharer.

There can be no adverse possession by one co-sharer as against others until there is ouster or exclusion. The possession of a co-sharer becomes adverse to another co-sharer from the moment when there is an ouster, that is, after there is an assertion of hostile title by one co-sharer against the others to the knowledge of the latter. (*D. N. Mitter & Patterson, JJ.*)

NIRMAL CHANDRA DAS & ORS vs. MOHITOSH DAS & ORS.

40 C.W.N. 777, = A.I.R. 1936 Cal. 106
= 161 I.C. 450

Land submerged in water—Trespasser, if can obtain title by adverse possession.

When land in the possession of a trespasser is submerged in water for a length of time, no possession can be said to continue with such trespasser so as to be made available towards the acquisition of title by adverse possession. During this period, the possession of the true owner must be deemed to have revived constructively. 29 Cal. 518 referred to. (*Srivastava & Nanavutty, JJ.*)

PARTAB BAHADUR SINGH vs. JAGAT-JIT SINGH.

1936 O.W.N. 784 = 164 I.C. 118 = A.I.R. 1936 Qndh. 387.

Ouster of co-sharer—Knowledge on the part of person ousted, if essential—Proof of ouster.

The onus of proving ouster is upon the person who sets up adverse title by ouster. The mere fact of non-receipt of rent is not conclusive proof of ouster by a co-sharer who is in possession. Exclusion or ouster involves not merely the act of the person ousting, but the state of mind of the person ousted. Knowledge on the part of the latter is therefore essential. (*Wort & Rowland, JJ.*)

MT. BIBI ZAINAB & ORS. vs. MAHAM-MAD AYUB.

17 P.L.T. 366 = A.I.R. 1936 Pat 136 =
161 I.C. 331 (2).

Adverse Possession—(Contd.)

Tenant in common with others who are in possession, if can be deemed to be in constructive possession of the property.

The mere fact that a person is a tenant in common with others who are in possession of the property is sufficient to show that the person is in possession, even if he lives a great distance from where the property is situate, and even if he had nothing whatever to do with the property, unless it can be shown that other co-tenants had ousted the person from the property. (*Wort J.*)

MOTI SINGH & ORS. vs. DEOKI SINGH & ORS.

17 P.L.T. 170 = A.I.R. 1936 Pat. 66 =
160 I.C. 1054.

Non-payment of rent by tenant, if creates adverse possession.

Mere non-payment of rent by a tenant does not by itself create adverse possession in his favour. There must be definite and open assertion by the tenant and to the knowledge of the landlord that the tenant has a right to hold the land without payment of rent. (*Mohammad Neor & Rowland, JJ.*)

JYOTI PROSAD SINGH DEO vs. RAJENDRA NARAIN SINGH DEO.

A.I.R. 1936 Pat. 287 = 162 I.C. 838.

Person in possession setting up hostile title—Possession referable to lawful title—Possession, if adverse to the true owner.

Where a person is setting up a hostile title and is in possession, his possession will not be deemed to be adverse to the true owner if it can be referred to a lawful title. Therefore, if the possession of a person can be referred to a lawful title as mortgagee, the mere fact that he was openly setting up his right to succeed to the mortgagor will not prevent the possession from being referred to the lawful title, and being treated as not adverse to the true owner of the equity of redemption. (*Wadsworth J.*)

VEETIL, KELU vs. CHAKKARA CHAPPAN.

A.I.R. 1936 Mad. 308 = 161 I.C. 299
1936 M.W.N. 399.

Adverse Possession—(Contd.)

Co-owner in permissive possession of property on behalf of his co-owner, selling the property to third person—Adverse possession against co-owner, when commences.

Where A is in permissive possession of a property on behalf of his co-owner B, and he sells the property to C, time would begin to run against B from the date of his knowledge of the sale deed. But in the absence of proof of such knowledge, time would begin to run against B only from the time when C obtains possession exclusively, overtly and publicly, so that, if B had exercised due diligence he ought to have discovered that a stranger other than the person whom he had allowed to remain in possession was in sole occupation of the property. (*Sulaiman C. J. & Bajpai J.*)

RAM MANOHAR & ORS. vs. BABOO SINGH.

1936 A. W. R. 1014.

Possession of co-sharer, when can be said to be adverse.

Where possession can be referred to a lawful title, it will not, in the absence of very cogent reasons, be deemed to be derived from usurpation. When a person traces his title through co-sharers who did not enjoy the rents of the properties in dispute nor lived in the house which was the subject matter of suit, it can not be said that there was adverse possession by the co-sharer in possession. To constitute adverse possession it must be shown that the co-sharers had neither received the rents nor lived in the house and had knowledge that adverse possession was running against them. (*Wort & Rowland, J.J.*)

MT. BIBI JAINAB vs. MAHMMAD AYUB.

17 P.L.T. 366=A.I.R. 1936 Pat. 136=161 I.C. 331 (2).

Village proprietor in possession of a portion of the Shamlat, when can claim title by adverse possession against his co-sharer.

A village proprietor in possession of a portion of the Shamlat cannot claim title by adverse possession as against his co-sharer, unless he can establish that more than 12 years before he sold he had given

Adverse Possession—(Contd.)

unequivocal declaration or overt act that he had denied the title of his other co-sharers and converted his joint possession into exclusive possession. (*Jai Lal J.*)

LAKHA SINGH & ORS. vs. TEJA SINGH & ORS.

38 P.L.R. 453.

Grove land—Zamindar refraining from collecting rent—grove-holder raising buildings—Adverse title, if created.

In the case of groves, rent is taken from the grove-holders as long as any produce is forthcoming, and when the grove becomes old and the produce ceases, the Zamindar refrains from collecting rent, but this does not amount to any exercise of adverse possession on the part of the grove-holder. Similarly the mere erection of certain buildings on grove land does not necessarily amount to any evidence of adverse title, especially where it is not proved that the buildings were not erected with the permission of the Zamindar of the time. (*Sulaiman C. J. & Bennet, J.*)

RAM SEWAK vs. RANI SUBHADRA KUER.

1936 A.W.R. 390=1936 A.L.J. 472=A.I.R. 1936 All. 381=162 I.C. 907

Nature of title acquired by trespasser in respect of vacant sites of which only a part is occupied by him.

In cases relating to vacant sites, possession follows title. The mere fact that a trespasser has taken possession of a portion of a vacant site cannot affect the constructive possession of the real owner on the portion not trespassed upon. In such a case the wrong-doer can by lapse of time gain title only to the area actually possessed by him, and in suits governed by Art. 42, Limitation Act, it is only with regard to the portion of the site actually in possession of the trespasser that the plaintiff will be required to prove his possession within 12 years. (*Tekchand & Dulip Singh J.J.*)

SHER MOHOMAD SHAHBAZ KHAN vs. SHER MAHOMED BANNE KHAN.

17 Lah 449=A.I.R. 1936 Lah. 208=162 I.C. 330=38 P.L.R. 988.

Adverse Possession—(Contd.)

Suit for recovery of possession of building—Defendants claiming to possess the same as co-sharers—Statement in another case that defendants were occupying the house with consent of plaintiff—Proper inference to be drawn.

In a suit for recovery of possession of a house by ejecting the defendants who were in occupation, the latter set up the plea that they were co-sharers and not tenants as alleged by the plaintiff. No payment of rent was proved but from a certain statement in another case, it appeared that the defendants were occupying the house with the consent of the plaintiffs. *Held*, that the proper inference was that the defendants' possession was permissive and not adverse to the plaintiffs, and the plaintiffs must be deemed to have been in constructive possession all along. The fact that the plaintiffs had overstated their case in alleging that they were realising rents from defendants could not be considered to be sufficient to defeat the plaintiffs' claim. *B. hide, J.*)

MAHAMED YAKUB vs. ABDUL KARIM.
160 I.C. 1033 = A.I.R. 1936 Lah. 736.

Mortgagee in possession, if can claim adverse possession under invalid sale.

A mortgagee in possession of property cannot claim adverse possession as against the real owners under an invalid sale to him, on the strength of his possession as mortgagee. (*Addison & Abdul Rashid J.J.*)

LACHHMAN SINGH vs. NAWAB.

38 P.L.R. 716 = 163 I.C. 48.

Sale of minor's property by unauthorised person—right of minor to sue for possession—adverse possession, how far can mature against the minor.

A minor is entitled to bring a suit for possession within three years of his attaining majority, to undo what an unauthorised person has done on his behalf, and so long as the minor's right to sue for possession subsists and has not been extinguished under Sec 28, Limitation Act, no adverse possession can mature against him, 24 Mad 387 relied on. (*Din Mohammad, J.*)

NAWAB vs LACHHMAN SINGH.

38 P.L.R. 831 = A.I.R. 1935 Lah. 924 = 163 I.C.

Adverse Possession—(Contd.)

Possession of wrong doer over part of immovable property when amounts to constructive possession of whole.

Acts of possession over a part of any immovable property might be evidence of *defacto* possession of the whole. This rule operates with full force in favour of rightful owners, and it should be allowed with some reservation in favour of wrong-doers. In the case of the latter, it is sometimes difficult to say in the connecting link of title how far the whole extended. The want of the connecting link might further be supplied by others such as, close connection and interdependence between the part actually possessed and the whole of which it is claimed to be a part. (*Guha & Lodge, J.J.*)

DURGARAM CHOWDHURY vs. AMRIT CHANDRA GOSWAMI.

62 C.L.J. 234.

Possession of tenant when becomes adverse to mortgagor.

A tenant put in possession of land by a mortgagee may claim adversely against him, but he cannot claim an adverse possession against the mortgagor until the mortgage is redeemed and the mortgagor becomes entitled to immediate possession. (*Addison & Din Mohammad, J.*)

AMARNATH vs. DUNI.

38 P.L.R. 840.

Person in wrongful possession—Decree against him that his possession is adverse—Effect of such person continuing in possession in spite of the decree.

When a person is in adverse possession he is in the wrong, and from the date of his possession starts maturing a title, and if a decree is passed against him declaring that his possession is adverse, it simply "emphasise" the fact that the possession is adverse", and if in spite of the decree he remains in possession, his possession, if anything, becomes still more adverse. The decree does not put a stop to the adverse possession, and if he continues to be in possession for 12 years before suit, his title is perfected. 46 Bom 710 dissented from 46 Mad. 525 & 46 Mad. 761 relied on. (*Bajpai, J.*)

MAHAMMAD TAHIR vs. BECHEY LAL.

1936 A.I.R. 458 = 1936 A.L.J. 583 = A.I.R. 1936 All. 466 = 163 I.C. 545.

AGENCY RULES.

Power of High Court to revise order of Agency District Munsiff.

A suit for settlement of partnership accounts filed before the Agency District Munsiff of Rayagala was referred to arbitration. An award was made by the arbitrators in favour of the plaintiff. The defendant filed certain objections to the award, but they were over-ruled and a decree was passed in terms of the award. The defendants having thereupon moved the High Court in revision, an objection was taken that the High Court had no jurisdiction to entertain the revision petition. *Held*, that under the provisions of Sec. 107 of the Government of India Act, 1915, and of cl. 16 of the Letters Patent, Madras High Court, the High Court had jurisdiction to entertain the revision petition. (*Pandurang Rao, Wadsworth & Venkataramana Rao, J.J.*)

ADHIKARI VENKU NAIDU vs. MAHADEVU SANYASI.

59 Mad. 356=70 M.L.J. 204=1936 M.W.N. 81=43 M.L.W. 237=161 I.C. 310=A.I.R. 1936 Mad. 187.

AGRA PRE-EMPTION ACT XI (or 1922.)

.. **Sec. 4 (3)**—"Land"—person entitled to one-half share in site and two entire houses standing thereon—Houses, if "land" within the Act.

Where a person is entitled to one-half share in the site and two entire houses standing thereon, it is difficult to say that the two houses should be considered to be attached to, or permanently fastened to, any thing attached to the one-half share in the land. In such a case, the houses cannot be held to be "land" within the meaning of the *Agra Pre-emption Act*. (*Sulaiman C. J. & Bennet J.*)

MT. ZAINAB BIBI vs. UMAR HAIAT KHAN.

1936 A.W.R. 492=1936 A.L.J. 456=161 I.C. 753=A.I.R. 1936 All. 732.

Sec. 16—Sale deed comprising property which pre-emptor entitled to pre-empt under the Act—Exclusion of latter property from suit for pre-emption-effect of.

Agra Pre-emption Act—(Cont.)

Under Sec. 16, *Agra Pre-emption Act*, it is only incumbent upon a pre-emptor to include in his claim all such property as he is entitled to pre-empt under the Act. Where the vendee has included in the sale deed some property to which the pre-emptor has no right of pre-emption under the Act, the pre-emptor can leave it out and his suit for pre-emption in respect of the other property to which he is entitled to pre-empt under the Act, would not fail by reason of his having left out property to which he is not entitled to pre-empt under the Act. (*Sulaiman C. J. & Bennet J.*)

MT. ZAINAB BIBI vs. UMAR HAYAT KHAN.

1936 A.W.R. 492=1936 A.L.J. 456=161 I.C. 753=A.I.R. 1936 All. 733

AGRA TENANCY ACT (III of 1926.)

Sec. 3 (2) (15)—Grove land in possession of owner—Owner planting trees—such land, if saleable through civil court.

If a piece of land comes within the definition of "grove land", under Sec. 3 (2) *Agra Tenancy Act*, the land is agricultural land and cannot be sold through the civil court. If on the other hand, the land is not agricultural land but is a garden, then, it may be sold through the court. The criterion for drawing the distinction between a garden and a grove is supplied by the definition of grove in Sec. 3 (15), *Agra Tenancy Act*. A distinction is drawn in regard to the kind of fruit trees. Certain fruit trees such as guavas, peaches, papitas etc. are trees which do not constitute a grove, but on the other hand, such trees as mangoes, jack-fruit, etc. which occupy the land for a long period do constitute a grove. (*Sulaiman C. J. & Bennet, J.*)

NANDU MAL vs. PANNA LAL.

1936 A.L.J. 576=1936 A.W.R. 524=A.I.R. 1936 All. 436=163 I.C. 823

Sec. 3 (8) & (15)—"Grove" and "grove-land"—Distinction between.

Per Sulaiman C. J.—There is a clear distinction drawn in the *Agra Tenancy Act* between the words "grove" and "grove-land." "Grove-land" means the land on which

Agra Tenancy Act—(Cont.)

the trees stand, and which would according to the definition of holding, in Sec. 3 (8) of the Act be a holding, whereas, the grove, viz., the trees which stand on it, would not be a holding, and the groveholder who planted the trees, would have proprietary interest in the trees.

Per Bennet J.—A groveholder is the holder of the grove and also the holder of the groveland, and his holding comprises both the grove and the groveland.

BAORIDI MIAN vs. BHAGWAN DIN.

57 All. 922 = A.I.R. 1935 All. 760.

Sec. 4 (d)—*Land in management of trustees of joint Hindu family property—Father one of the trustees—Land, entered as Khudkast from before 1924—Land if becomes "Sir", of the joint family or of the father alone.*

Where land has been entered as khudkast from before 1924-25 and the management of the land is in the hands of trustees who are acting on behalf of the joint Hindu family and one of whom is the father, the land legally becomes the "Sir" of the joint family and not of the father alone, under Sec. 4 (d), Agra Tenancy Act. (*Bennet & Smith J. J.*)

INDERJIT SING vs. GIRI RAJ SINGH.

164 I.C. 913 = 1936 A.W.R. 651 = 1936 A.L.J. 993 = A.I.R. 1936 All. 671.

Secs. 8 & 73—*Theka covenant that any remission or suspension made by Government should have no effect against lessor—Covenant, if binding on thekadar.*

The word 'tenant' in Sec. 8, Agra Tenancy Act, does not include a thekadar, and it is open to a Zamindar to grant a theka which contains provisions contrary to the provisions of Act. III of 1926 in regard to tenants. Consequently a covenant in a lease by a zamindar to a thekadar, that any remission or suspension made by Government on account of terrestrial and celestial calamities shall have no effect as against the lessor, is not affected by the provisions

Agra Tenancy Act—(Cont.)

of Sec. 73 of the Agra Tenancy Act, 1926. (*Bennet & Smith J.J.*)

MAKHAN LAL vs. MUHAMMED TAWAS-SUL HUSSAIN.

1936 A.W.R. 729 = 1936 A.L.J. 828 = 164 I.C. 600 = A.I.R. 1936 All. 628.

Sec. 14—*Agreement for partition—Father and son constituted co-sharers and agreeing to exchange of sir and khudkast—expropriatory rights, if arise.*

If father and son are constituted co-sharer by an agreement for partition, and by a particular clause they agree to an exchange of the Sir and khudkast, it is a clear case of exchange between the co-sharers in the mahal, and therefore no expropriatory rights will arise under Sec. 14, Agra Tenancy Act. (*Bennet & Smith J.J.*)

INDERJIT SINGH vs. GIRI RAJ SINGH.

1936 A.L.J. 993 = 1936 A.W.R. 651 = A.I.R. 1936 All. 671 = 164 I.C. 913.

Sec. 14—*Expropriatory rent fixed by agreement—Rent, if can be recovered by suit if it is not in excess of the legal rate.*

Expropriatory rent fixed by agreement between an ex-proprietor tenant and his zemindar can be recovered by suit if it is not in excess of the legal rate. (*Allsop J.*)

DATA RAM vs. JHAOO LAL.

1936 A.W.R. 416 = A.I.R. 1936 All. 200 = 161 I.C. 750.

Sec. 16—*Words "under the Act" added by Amending Act of 1929—Meaning of—pre-emptor, if may exclude in his claim properties which he is entitled to pre-empt under some law or custom outside the Act.*

The obvious intention in the addition of the words "under the Act" at the end of Sec. 16, Agra Pre-emption Act, 1922, by the Agra Pre-emption Amendment Act 1929, is that a pre-emptor is no longer compelled to include in his claim properties to which he may be entitled under some law or custom outside the Agra Pre-emption Act, and all that is necessary is that he must bring his suit for pre-emption in res-

Agra Tenancy Act—(Contd.)

pect of the property which he is entitled to pre-empt under the Agra Pre-emption Act. (*Sulaiman C. J. & Bennet J.*)

MT. ZAINAB BIBI vs. UMAR HAYAT KHAN & ORS.

1936 A.W.R. 492=1936 A.L.J. 456=
161 I.C. 753=A.I.R. 1936 All. 732.

Sec. 44—*Co-sharer in possession of plots dispossessed by strangers at the instigation of other co-sharers—Suit for possession, if maintainable in revenue court.*

The plaintiffs who were in possession of certain plots for a considerable time as co-sharers had sown crops on those plots. The defendants uprooted the crops and took possession of the plots at the instigation of and in collusion with two of the other co-sharers. Thereupon the plaintiffs sued the defendants in the civil court for possession and damage. *Held*, that the suit did not come within the purview of Sec. 44, Agra Tenancy Act and was cognisable by the civil court. (*Bajpai J.*)

RAHMAT vs. AMBIKA PRASAD.

A.I.R. 1936 All. 13=1935 A.L.J. 1935
=160 I.C. 302.

Secs. 45 & 230—*Attachment of Zamindari—Judgment-debtor granting lease on low rent just before coming into force of new Tenancy Act to defraud rights of attaching creditor—Attaching creditor purchasing zamindari at auction sale—Rights of such creditor.*

The grant of lands to tenants in the ordinary course of management cannot be prohibited. The mere fact that the zamindar's estate is under attachment would not take away his authority to grant lands to tenants in the ordinary course of the management of the zamindari so long as the interest in the estate has not passed on to the auction purchaser. Such agricultural leases would not ordinarily be transfers of interest prohibited by Or. 21, r. 54, C. P. Code. The mere fact that by operation of law, tenants immediately become statutory tenants would not prevent zamindars from letting out lands and realising their rents from tenants. On the other hand, such a power cannot be allowed to be

Agra Tenancy Act—(Contd.)

exercised so as to defraud the just rights of attaching creditors. (*Sulaiman C. J. & Bennet J.*)

DALCHAND vs. NATHULAL.

1936 A.W.R. 475=1936 A.L.J. 665=
162 I.C. 48=A.I.R. 1936 All. 265.

Secs. 79 & 249—*Order by Assistant Collector under Sec. 79—Appeal to District Judge—Second appeal, if lies to the High Court.*

No second appeal lies to the High Court from an appellate order of the District Judge rejecting an appeal under Sec. 79 Agra Tenancy Act, by the Assistant Collector. (*Allsop J.*)

MUBARIK HASAN vs. ISHRI PRASAD.

1936 A.W.R. 472=1936 A.L.J. 678=
A.I.R. 1936 All. 421=161 I.C. 971.

Secs. 99, 121 & 230—*Suit by groveholder for declaration, that he is absolute owner of trees and for injunction, if maintainable in the Civil Court.*

A suit by a groveholder against his landlord for a perpetual injunction restraining the latter from offering obstruction to the appropriation of the produce of the trees planted by the plaintiff, or for possession of specific timber standing on the land, is, in view of the explanation to Sec. 230, Agra Tenancy Act, not cognisable by the Civil Court, inasmuch as adequate relief in the shape of compensation for the trees from which the groveholder has been dispossessed can be granted by the revenue court under Sec. 88 (1) (b) (iii), read with Sec. (11) (c) of the Act. (*Sulaiman C. J. & Bennet J.*)

BAQRIDI MIAN vs. BHAGWAN DIN.

57 All. 922=A.I.R. 1935 All. 605

Secs. 99 & 230—*Suit by one co-tenant against another for share of profits, if cognisable by Civil Court.*

Where one of several co-tenants in a holding is solely in possession, he cannot be considered to be in wrongful possession; nor can the co-sharers suing for profits be said to have been wrongfully dispossessed from

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the holding or tenure, for the possession of one co-sharer must be deemed to be the possession of all the co-sharers. A suit by one co-tenant does not therefore come under Sec. 99, Agra Tenancy Act; and such a suit not being specified in the fourth schedule of the Act, the jurisdiction of the Civil Court to entertain the suit is not ousted by Sec. 230 of the Agra Tenancy Act. (*Niamatullah & Allsopp JJ.*)

JUMMA DAS & ANR. vs. MISRI LAL & ORS.

57 All. 852 = A.I.R. 1935 All. 271.

Secs. 121 & 230—*Suit by plaintiffs as members of a joint Hindu family for declaration of their right as to zamindari properties & tenancy holding, if maintainable in Civil Court.*

A suit that is based on a cause of action with respect to which adequate reliefs can only be granted by the Civil Court is cognisable by that Court notwithstanding the fact that one of the reliefs prayed for by the plaintiff is for the declaration of the rights to tenancy holdings. Therefore, where the plaintiffs alleged and proved that they were members of a joint Hindu family with the defendants and were as such entitled to a declaration of their right as to zamindari properties and the tenancy holdings owned by the family, held, that the cause of action on which the suit was based was one with respect to which adequate relief could not be granted by the revenue Court, and the suit was maintainable in the Civil Court. (*Thom & Iqbal Ahmed, JJ.*)

SUKHDEO vs. BASDEO

57 All. 949 = A.I.R. 1935 All. 591.

Sec. 123—*Scope of the section.*

Where a zamindar sued for a declaration under Sec. 123, Agra Tenancy Act, that the defendants were liable to pay a certain sum, which included a small sum payable under the Benares Family Domains Act, 1904, annually, for their holding as fixed rate tenants, held, that the declaration could be granted under Sec. 123, Agra Tenancy Act. (*Bennet, J.*)

NURSING PRASAD SINGH vs. PURAN-MASHI.

1936 A.L.J. 282 = 1936 A.W.R. 475 = A.I.R. 1936 All. 459 = 161 I.C. 762.

Agra Tenancy Act—(Contd.)

Secs. 127-130—*Dispute between rival grove-holders as to right of transfer—Jurisdiction of Civil and Revenue Courts.*

Where the dispute in a suit is between rival grove-holders as to the right to transfer the grove or a part of the grove the suit is cognisable by a Revenue Court and not by a Civil Court, as the dispute can be the subject of a suit under Sec. 121, Agra Tenancy Act, (*Allsop J.*)

BACHCHAN vs. DAULATRAM.

1936 A.W.R. 118 = A.I.R. 1936 All. 64 = 160 I.C. 865.

Sec. 133—*Land in two Mahals forming one holding—single suit in respect of holding, if maintainable.*

There is nothing in the Agra Tenancy Act, 1926, to prevent a tenant and a zamindar entering into an engagement in respect of parcels of land in more than one Mahal, and if they enter into such an engagement, the land in the different mahals must constitute one holding, and a single suit in respect of the holding is maintainable. (*Allsop, J.*)

DATA RAM & ANR. vs. JHAOO LAL.

1936 A.W.R. 416 = A.I.R. 1936 All. 200 = 161 I.C. 759.

Secs. 197, 188 & 127—*Rent free grantee when liable to ejectment as non-occupancy tenant.*

Where a rent-free grantee not being a grantee to whom the provisions of Secs. 185 or 186 of the Agra Tenancy Act, 1926, applies, to whom the land was either granted by the landlord for the purpose of planting a grove or who planted a grove with the implied permission of the landlord cuts down the grove, he is liable to be ejected as a non-occupancy tenant. (*Bajpai J.*)

JAGANNATH vs. BRIKAM SINGH.

1935 A.L.J. 1283.

Sec. 201 (3)—*Provision as regards presumption in Sec. 201 (3) dropped in new Act during pendency of an appeal—appellate Court, if entitled to apply provisions of new Act.*

In a suit for profits filed in the Revenue Court before the coming into force of the

Agra Tenancy Act—(Contd.)

new Act III of 1926, the parties led evidence as to the extent of plaintiff's share in the Khewat and both the Courts below found in favour of the defendants. In second appeal the plaintiffs raised for the first time a new point that, under Sec. 201 (3) of the Old Tenancy Act, there was a conclusive presumption in favour of the plaintiff that they possessed the share which was recorded in their name. *Held*, that when the appeal was before the lower appellate Court, the new Act having come into force, the Court was no longer handicapped by the provision as regards presumption in Sec 201 (3) of the Old Act, which had been dropped in the New Act and was therefore entitled to apply the provisions of the new Act and go into merits. (*Sulaiman C. J. & Bajpai J.*)

BHOWANI PROSAD vs. BAHAL SINGH.

1936 A.L.J. 801=A.I.R. 1936 All. 492
=163 I.C. 767

Sec. 223—Assignment of revenue—liability of co-sharers to assignee—assignee if entitled to joint decree against all co-sharers.

An assignee gets the same rights as his assignor, and the assignment does not affect the liability of the persons who were liable to the assignor. An assignee of revenue is therefore entitled to joint decree for arrears of revenue against all the co-sharers, and not against the *lambardar* alone. 1935 A. W. R. 621 relied on. (*Ganganath J.*)

NAIPAL SINGH vs. R. R. SKINNER.

1935 A.W.R. 1479.

Sec. 226—Lambardar holding a cattle market on common land at his own expense—income from such market if divisible among co-sharers.

Where a *lambardar* had at his own expense and labour started a cattle market on certain common land, and the other co-sharers instituted a suit for profits against him, *held*, that the co-sharers were not entitled to any share of the profits derived by him from the cattle market, but only to a fair rent for the land used by him. (*Harries & Rachhpal Singh JJ.*)

CRATTER SINGH vs. AJUDHIA PROSAD.

57 All. 707=162 I.C. 763=A.I.R. 1936 All. 324.

Agra Tenancy Act—(Cont.)

Sec. 230 & Sch. IV.—Suit for arrears of rent under joint lease for agricultural land and shops—court by which triable.

A suit for arrears of rent due under a jointly lease for agricultural land and for shops reserving one sum of rent, does not fall under the Fourth Schedule of the Agra Tenancy Act, and not being excepted by Sec. 230, Agra Tenancy Act, from the jurisdiction of the Civil Court is triable by the Civil Court and not by the Revenue Court. (*Ganganath & Smith JJ.*)

DAN DAYAL vs. RAM PROSAD

1936 A.W.R. 616=A.I.R. 1936 All. 417=1936 R.D. 283.

Secs. 240 & 249—Order of remand by District Judge in first appeal—Appeal to High Court, if maintainable.

No appeal is provided in the Agra Tenancy Act from an order of remand passed by a District Judge. Where therefore in a suit for profits, the Revenue court accepts the finding of the Civil court on a question of title referred to it by the Revenue Court, and the District Judge on appeal sets aside that finding and remands the whole case to the Revenue Court for the determination of the amount of profits, no appeal lies to the High Court against the order of remand passed by the District Judge. (*Sulaiman C. J. & Bennet J.*)

PANCHAM vs. RAMESWAR.

1936 A.W.R. 393=162 I.C. 954=1936 A.L.J. 337=A.I.R. 1936 All. 376.

Sec. 242 (d)—Dispute as to liability of individual co-sharer to pay revenue and not as to amount of revenue—appeal if lies.

Cl. (d) of Sec. 242, Agra Tenancy Act, is limited to cases in which the amount of the revenue payable is in dispute. Its language is not wide enough to include cases in which the liability to pay revenue as between two individuals is the question at issue. Where therefore the dispute is not as to the amount of revenue payable, but only as to the liability of individual co-sharers to pay the revenue, no appeal lies to the District Judge under the clause. (*Niamatullah & Bajpai JJ.*)

PYARE LAL vs. AMNA KHATUN BEGAM.
57 All. 974.

Agra Tenancy Act—(Contd.)

Sec. 243 (a)—*Defendant denying plaintiff's proprietary right without setting up any right in himself—provisions of the section if applicable.*

The words "proprietary right has been in issue between the parties claiming such right" in Sec. 243 (a) Agra Tenancy Act, clearly indicate that the dispute between the parties should be as regards their respective proprietary rights and that each party should be claiming such right. The mere fact that the defendant is denying the plaintiff's proprietary right without setting up any proprietary right in himself would not bring the case within the scope of the section because there would be no question of any proprietary right between the parties claiming such rights. (*Sulaiman C. J. & Bajpai J.*)

KAN KAUR vs. ATAL BEHARI LAL & ORS.

1936 A.W.R. 954 = 1936 A.L.J. 1007 =
A.J.R. 1936 All. 800 = 185 I.C. 736.

Secs. 248 (3) & 249—*Judgment—debtor's objection to execution of Revenue Court decree dismissed—decision confirmed in appeal—second appeal, if lies.*

No second appeal to the High Court from an order passed in appeal under Sec. 248 (3), Agra Tenancy Act, dismissing an objection by the judgment-debtor in the execution of a Revenue Court decree. (*Bennet J.*)

MR. GULAB DEVI vs. ABDUL GHAFUR KHAN & ORS.

1936 A.W.R. 984.

Sec. 249—*Order under Sec. 47 passed by Revenue court—Application under Sec. 79—Order by Asst. Collector—Appeal to District Judge—Second appeal, if lies.*

Taking the definition of the term "decree" as defined in Sec. 3 (18) of the Agra Tenancy Act and reading it with the provisions of Sec. 242 & 248 of the Act, is clear that the intention of the Act is that orders mentioned in Sec. 47 C. P. Code, when passed by Revenue Court shall be regarded as order and not as decrees. Accordingly an order passed by the District Judge in appeal from an order of the Assistant Collector or

Agra Tenancy Act—(Contd.)

an application under Sec. 79, Agra Tenancy Act for the execution of decree for arrears of rent by ejectment, is an order within the meaning of Sec. 249 and no second appeal lies to the High Court. (*Allsop J.*)

MUBARIK HASSAN vs. ISHRI PROSAD.
1936 A.L.J. 678.

Sec. 267.—*Reference to High Court—jurisdiction of the High Court, if affected by the fact that the question had already been considered by the High Court at a previous stage of the case.*

The plaintiff instituted a suit in the Court of the Munsiff, against his co-sharers in an expropriatory tenure, for his share of the profits. The Munsiff held that the suit was cognisable by a revenue Court. On appeal the District Judge held that the suit had been rightly instituted in the Civil Court, but the High Court, in revision set aside the District Judge's order and restored that of the Munsiff. The plaintiff then presented his plaint in the revenue Court, which however dismissed the suit on the ground that it was cognisable by the Civil Court. On appeal to the Commissioner he made a reference to the High Court under Sec. 267, Agra Tenancy Act. Held, that the previous order of the High Court was no bar to the Bench hearing the reference, as the Bench was not acting in the exercise of its appellate jurisdiction, but of a special jurisdiction given to it by Sec. 267, Agra Tenancy Act. The order passed by the High Court upon the reference was under cl (5) of Sec. 267, binding on all courts subordinate to the High Court or to the Board of Revenue. (*Niamatullah & Allsopp JJ.*)

QUDSIA JAN vs. ZAHID HUSSEIN & ORS.

57 All. 854.

Secs. 268 & 273—*Suit relating to an agricultural holding filed in Munsiff's Court—Appeal to District Judge—objection that Munsiff was in error in referring an issue under Sec. 273 to Revenue Court—objection if can be entertained in appeal.*

Where a suit relating to an agricultural holding is filed in the Court of the Munsiff

Agra Tenancy Act—(Contd.)

and an appeal is preferred to the District Judge, an objection that the Munsiff in whose Court there was no want of jurisdiction made an error of procedure in referring an issue to the Revenue Court under Sec. 273, Agra Tenancy Act, cannot on the principle of Sec. 268, be entertained in appeal. (*Sulaiman C. J. & Bennet J.*)

NANDAN SINGH & ORS. vs. PHUNESH SINGH & ORS.

1936 A.W.R. 1085

Sec. 273 (1)—"Agricultural holding" meaning of.

Land taken for growing vegetables is an "Agricultural holding" within the meaning of Sec. 273, Agra Tenancy Act. (*Sulaiman C. J. & Bennet J.*)

NANDAN SINGH & PHUNESH SINGH.

1936 A.W.R. 1085.

ALLAHABAD HIGH COURT RULES.

Chap. I. r. 1 (iv)—Application under the rule—valuation.

Chap. I, r. 1 (iv) of the Rules of the Allahabad High Court requires at least by implication that an application thereby contemplated should be specifically valued, and such valuation should appear on the face of it. Where any application is found not valued, the Counsel should be called upon to state the valuation which will determine the jurisdiction of the Bench under that rule. The office is not justified in assuming that the value of an application under S. 5, Limitation Act, which is not specifically valued, cannot exceed the value of the appeal. (*Niamatullah & Bajpai JJ.*)

DURGA & ORS. vs. LAKHPAT RAI.

1936 A.L.J. 1=1936 A.W.R. 63=160
I.C. 376=A.I.R. 1936 A.L. 139.

Chap. I. r. 1 (iv)—Jurisdiction of single judge to hear an appeal from an application under S. 5, Limitation Act.

Under Chapter I, r. 1 (iv) of the Rules of the Allahabad High Court, even though the appeal in respect of which an application under S. 5, Limitation Act is made can

Allahabad High Court—(Contd.)

not be heard by a single Judge being valued at more than Rs.1,000, an application under S. 5, made in that appeal, can be heard by a single judge if the applicant has not valued it at a sum exceeding Rs. 2,000. (*Niamatullah & Bajpai JJ.*)

DURGA & ORS. vs. LAKHPATI RAI.

1936 A.L.J. 1=1936 A.W.R. 63=160
I.C. 376 A.I.R. 1936 A.L. 139

Chap. 21 r. 1.—Fee payable to legal practitioners—Certificate filed—Duty of Court to be satisfied that the fee had been paid.

Where a certificate of fees paid to a counsel is filed and the same is not contradicted, the Court may accept the certificate but it must be satisfied that the fee has been paid before the account is included in the decree. (*Allsop J.*)

SARJURAM SAHOO vs. MT. DULARNA BIBI.

1936 A.W.R. 384=1936 A.L.J. 507=
162 I.C. 53 2)=A.I.R. 1936 A.L. 652.

ALLUVION & DILUVION.

Right to increment arising from gradual accession from recess of river.

When land is gained by gradual accession from recess of river and not by a sudden change of its course, the increment enures for the benefit of the person to whose land or estate it is thus increased. (*Kangilal J.*)

ASAD KHAN vs. UMAR KHAN & ORS.

A.I.R. 1935 Lah. 921

ALLUVION & DILUVION ACT IX (of 1847).

Assessment of revenue on lands thrown up by river—claim that such lands originally formed part of a permanently settled estate—onus of proof.

If any land is thrown up by a large and navigable river and appears to be the property of Government, the Revenue authorities are required to have immediate possession of the same on behalf of the Crown and assess revenue on and settle it according to the rules in force in that behalf. If any

Alluvion & Diluvion Act—(Contd.)

person claims that such land formed part of the permanent estate settled with him at the time of the Permanent Settlement and thus is not liable to further assessment of revenue, the onus is on him to prove his claim. This is so even when the river is constantly changing its course. 39 C. W. N. 994 relied on. (*Mukherjee & S. K. Ghosh JJ.*)

SECRETARY OF STATE vs. RANJIT PAL CHOWDHURY & ORS.

40 C.W.N. 395.

APPEAL.

Right of Appeal—Right of appeal when lost by party by reason of the acceptance of benefit under decree or order.

A party does not lose his right of appeal on the ground of having accepted the benefit of the decree or order concerned, unless the decree or order imposes a term or condition on the opposite party which is for the benefit of the appellant and the latter accepts the benefit of such term or condition. In any event there must be the benefit conferred on the appellant by the decree itself. (*Guho & Bartly JJ.*)

GOPESH CH. ADITYA vs. BENODE LAL DAS.

165 I.C. 606 (2) = 40 C.W.N. 553 = A.I.R. 1936 Cal. 424.

Right of appellant—Objection to valuation of suit, if may be taken in appeal.

An appellant is not debarred from raising an objection to the valuation of a suit for the purpose of jurisdiction, even if he did not press the point in the trial court and did not raise it in the grounds of appeal, but, on the other hand, valued the appeal at the same figure as the suit was valued in the trial court. (*King C. J. & Zia-Ul-Hasan J.*)

LACHMAN SINGH & ORS vs. DHANES SINGH & ANR.

1936 O.W.N. 25.

Right of appellant—Pure question of law, if can be raised for first time in appeal.

Appeal—(Contd.)

A pure question of law, which is not dependant on any disputed facts can be raised for the first time in appeal. (*Mitter & Patterson JJ.*)

KRISHNA PRASAD ROY CHOWDHURY & ANR. vs SECY. OF STATE.

63 C.L.J. 52 = A.I.R. 1936 Cal. 774

Right of appellant—Right of pleader to be heard before appeal is dismissed summarily.

Before dismissing an appeal by an accused person summarily, the Judge ought to give the pleader an opportunity of arguing the case. If no such opportunity is given, the order dismissing the appeal summarily is liable to be set aside. (*Cunliffe & Henderson JJ.*)

JITENDRA NATH GORAI vs. EMPEROR.

A.I.R. 1936 C.I. 294 = 163 I.C. 238 = 37 Cr.L.J. 831 = 1936 Cr.C. 531

Right of appellant Person engaging pleader for trial court under special power of Attorney, if can engage a pleader for prosecuting the appeal.

An appeal is a continuation or a stage in the progress of the suit. Therefore, where a special power of attorney provided that "whatever shall be done by the agent shall be acceptable to the executant thereof" and the attorney who had engaged a pleader in the trial court again engaged a pleader for prosecuting the appeal, held, that the attorney had power to do so. (*Agha Haidar J.*)

RASUL SHAH vs. DEWAN CHAND.

A.I.R. 1936 Lah. 583 = 165 I.C. 274

Right of appellant—Appeal cognisable by two judges at time of filing—subsequent amendment of rules making it cognisable by single judge—appellant if can claim hearing by two judges.

Where an appeal at the time when it is filed is cognisable by a bench of two Judges of the High Court, but by a subsequent amendment in the rules the appeal is cognisable by a single Judge, the appe-

Appeal—(Contd)

lant cannot claim as of right that the appeal should be heard by a Bench of two Judges of the High Court. (*Sulaiman C. J. & Allsop J.*)

HAR PRASAD & ANR. vs. BOOL CHAND.
1936 A.W.R. 975 (1) = Y936A.L.J. 1046.

Jurisdiction in appeal—Pre-emption suit—land valued for jurisdiction at less than Rs. 5,000—decree for pre-emption on payment of more than Rs. 5,000—court to which appeal lies

A suit for pre-emption was valued for the purpose of jurisdiction at a sum less than Rs. 5000, but a decree was passed for payment of more than Rs. 5,000. Held, that an appeal from that decree lay to the District Judge and not to the High Court. (*Hilton & Rangilal JJ.*)

JAGADISH RAM vs. MT. CHINTO & ORS.
A.I.R. 1936 Lah 133.

Powers of appellate Court—Question of fact—appellate Court, when to interfere.

In an appeal involving only a simple question of fact, the Appellate Court cannot differ from the view taken by the Judge of the trial Court who heard and saw the witnesses, unless there is something to show that he did not weigh the evidence fairly and properly. (*Sulaiman C. J. & Bennet J.*)

MAHENDRA SINGH vs. SANKAR DOYAL SINGH.

1935 A.W.R. 1422

Powers of appellate Court—Findings of fact arrived at by trial Court—power of appellate Court to interfere with such findings.

Generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be

Appeal—(Contd)

put aside on a mere calculation of probabilities by the Court of appeal. The rule however does not deprive an appellate Court of the right to scrutinise carefully for itself the evidence upon which the trial Court had arrived at a certain finding, (*Nanomutty & Zia-ul-Hassan JJ*)

MAHABIR SINGH vs. RAM RUP SINGH & ORS.

1936 O.W.N. 906 = 165 I.C. 49

Powers of appellate Court—Question of res-judicata not raised by pleadings or issues—appellate Court, if can decline to go into it.

The appellate Court can rightly decline to allow the appellants to go into the question of *res-judicata* on the ground that it had not been properly raised by the pleadings or in the issues. (*Lord Thankerton.*)

JAGADISH CH. DAS DHARAL DEB vs. GOUR HARI MAHTO & ORS

1936 A.W.R. 717(1) = 1936 O.W.N. 669
164 I.C. 17 = 44 M.L.W. 446 = 38 Bom.
L.R. 1125 = 1936 A.I.R. 258 (P.C.)

Powers of appellate Court—Trial before Judge sitting alone—Question of fact—Power of Court of appeal to overrule Judge of first instance.

In an appeal exclusively from the finding of fact arrived at by a Judge sitting alone, where such decision is based in the trial Judge's opinion of the trustworthiness of witnesses whom he has seen, the Court of appeal must in order to reverse the decision not merely entertain doubts where the decision below is right but be convinced that it is wrong. (*Derbyshire C. J. & Costello J.*)

DWARKARAM vs. K. C. DEY & Co,

40 C.W.N. 515

Powers of appellate Court—Decision by trial Court as to the credibility of a witness if may be interfered with by the appellate Court.

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of

Appeal—(Contd.)

their evidence, that judgment is entitled to great respect, and that, quite irrespective of whether the judge makes any observation with regard to credibility or not. The appellate Court should not interfere with such decision unless it comes to the conclusion that the trial Court was plainly wrong. (*Page C. J. & Mya Bu J.*)

CHINNA vs. U KHA.

14 Rang. 11.

Duty of appellate Court—Trial Judges conclusion on the question of fact based on credibility of witnesses—Function of Court of appeal.

An appellate tribunal will generally defer to conclusions reached by the trial Judge upon a consideration of the trustworthiness of the witnesses whom he has seen and heard and the Court of appeal must in order to reverse such findings not merely entertain doubts whether the decision is right but be convinced that it is wrong. (*Lord Atkes.*)

ANTONIO DIAS CALDEIRA vs. FREDERIK AUGUSTUS GRAY.

1936 A.L.J. 638=1936 A.W.R. 606=
44 M.L.W. 67=1936 M.W.N. 432=162.
I.C. 426=A.I.R. 1936 P.C. 154 (P.C.)

Power of appellate Court—Appeal against a judgment of a Judge sitting alone—finding as regards credibility of the witnesses power of the appellate court to overrule.

On an appeal against a judgment of a Judge sitting alone, the Court of appeal will not set aside the judgment unless the appellant satisfies the court that the Judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence, the court of appeal will have special regard to the fact that the Judge saw the witnesses. When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great weight. But when the finding of the trial court is based on an inference from undisputed facts or documents, or when the Judge, through inadvertence, misdirects himself, or his find-

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ings are falsified by some definite and indisputable objection of fact, the trying Judge is in no better position than an appellate court, and his findings are liable to be scrutinised by that Court. (*Costello & Panckridge JJ.*)

BAIDYANATH SEN vs. KUMUD CH. PAL.

63 Cal. 713=164 I.C. 815=43 C.W.N. 813

Duty of appellate Court—Appellate Court, if bound to look into all evidence in order to arrive at findings of fact.

There is no authority which lays down that the appellate Court before recording a finding of fact must refer to each and every document or piece of evidence on the record. It must be assumed that all the relevant evidence was brought to the notice of the Judge hearing the appeal, and he had it in his mind when he delivered his judgment. (*Agha Haider J.*)

MST. AKHTARI BEGUM vs. ALLAH JAWAIA.

A.I.R. 1936 Lah. 543=164 I.C. 392.

Duty of appellate Court Enactment having retrospective effect passed between date of decree and date of hearing of appeal if should be taken into consideration in disposing of the appeal.

An appellate Court is entitled to take into account changes of circumstances which occur between the date of the decree of the lower Court and the date of the hearing of the appeal. When therefore, between these dates, a new enactment is passed having a retrospective effect and affecting the vested rights of the parties, the appellate Court, in disposing of the appeal must take the enactment into consideration. (*Barlee & Sen JJ.*)

SHANTINIKETAN CO-OPERATIVE HOUSING SOCIETY, LTD. & ANR. vs. MADHAV LAL AMIROHAND & ORS.

60 Bom. 125=A.I.R. 1936 Bom. 37=
161 I.C. 96

Duty of appellate Court—Trial Court disallowing question in cross-examination—

Appeal—(Contd.)

procedure wholly unjustifiable—Remand, whether proper.

An Appellate Court should remand a case for retrial in accordance with law when it finds that the trial Court unjustifiably disallowed questions in cross-examination, and that the judge's manner of dealing with the points arising for consideration in the case, on the pleading of the parties and on the issues raised for determination, was wholly unsatisfactory. (*Guha & Bartley JJ.*)

CHITTAGONG COTTON MILLS LTD. vs. AMAR KRISHNA CHOWDHURY.

A.I.R. 1936 Cal. 195 = 162 I.C. 679

Second appeal—New plea containing pure question of law, if can be raised in second appeal.

A new plea containing a pure question of law not dependent on the decision of any question of fact can be allowed to be taken in second appeal. (*Bajpai J.*)

MIST. MAINA vs. BHAGWATI PRASAD & ANR.

1936 A.W.R. 691 = A.I.R. 1936 All. 557 = 164 I.C. 193 = 1936 A.L.J. 1230.

Second Appeal—Point of law not involving question of fact, if can be taken in second appeal.

A point of law which does not require for its decision, any determination of questions of fact can be allowed to be taken for the first time in second appeal. (*Khawja Mohammad Noor & Saunders JJ.*)

JOKIRAM SAGARMAL vs. MAHADEB MARWARI & ORS.

17 P.L.T. 57.

Second Appeal—construction of document if a question of law.

The construction of a document of title is a question of law, or at any rate, of mixed fact and law, and therefore may be considered in second appeal. (*Mohammad Noor & Rowland JJ.*)

JYOTIPRASAD SINGH DEO BAHADUR vs. RAJENDRA NARAIN SINGH DEO BAHADUR.

A.I.R. 1936 Pat. 287 = 162 I.C. 838

Appeal—(Contd.)

Second Appeal—Court's finding on meaning of words, if a finding of fact.

The finding of the District Judge on the meaning of a word as used in an agreement, is final and cannot be disturbed in second appeal. 80 I.C. 264 followed. (*Bhide J.*)

MAHMUD ALI vs. MT. GHOLAM FATIMA.

A.I.R. 1935 Lah. 902.

Second appeal—finding of fact by lower Court, when may be reversed by High Court.

A High Court has, in second appeal, a right to disturb findings of fact if those findings of fact are based upon inadmissible evidence. (*Nanavutty J.*)

IBRAHIM BEG vs. MST. AZIMAN & ANR.

A.I.R. 1936 Oudh 192 = 1935 O.W.N. 1388.

Second appeal—Finding of fact without consideration of relevant circumstances if can be challenged in second appeal.

A finding of fact by the first appellate Court without consideration of material facts and circumstances on which the trial Court based its decision is not binding in second appeal. (*Nasim Ali & Edgely JJ.*)

A. H. MOHAMMED ISMAIL & CO. vs. SACHCHIDANANDA BHATTACHARJA.

40 C.W.N. 769.

Second Appeal—Order passed on appeal against order dismissing objection under Or. 21, r. 90, C.P. Code, if further appealable.

No second appeal lies from an order passed on an appeal against an order dismissing an objection under Or. 21, r. 90, C.P. Code. (*Currie J.*)

HARO SINGH vs. LABH SINGH & ORS.

A.I.R. 1935 Lah. 962.

Second Appeal—Lower appellate Court entertaining Appeal which is not competent a High Court, if can interfere in appeal.

Where the lower appellate Court has heard an appeal which it was not competent to entertain on the ground that the order appealed against was not appealable,

Appeal—(Contd.)

then it is open to the High Court to set aside the order entertaining the appeal, and therefore an appeal lies to the High Court merely on the question of jurisdiction. (*Jailal J.*)

MAGHI MAI vs. GANPAT RAI.

38 P.L.R. 717=163 I.C. 121=A.I.R. 1936 Lah. 212.

Second Appeal—Material irregularity in publication and conduct of sale—second appeal if lies,

Where there is material irregularity in publishing and in conducting a sale, the proper procedure is to proceed under Or. 21 r. 90, C. P. Code, and no second appeal will lie. 7 Rang. 37 & 47 Mad. 288 distinguished. (*Mackney J.*)

S. A. RAMAN vs. SM. SUDARANI DAS.

A.I.R. 1935 Rang. 521.

Appeal to Privy Council—plea abandoned in India, if can be raised in the Privy Council.

Where a person, in effect, though not expressly abandoned in the trial Court his attention in regard to a certain matter and abstained from pressing his contention in the appellate Court, and for that reason no evidence was allowed to be taken on the point, held, that such person could not in appeal to the Privy Council be allowed to put forward the contention which he had abandoned in the Courts in India. (*Lord Atkeson.*)

GHANASHAM DAS JAGNANI vs. RAH NARAIAN GANESHI NARAIN.

17 P.L.R. 175=1936 O.L.R. 142=1936 O.W.N. 234=A.I.R. 1936 P.C. 89 (P. C.) 160 I.C. 901=43 M.L.W. 441.

Appeal to Privy Council—Concurrent findings of fact arrived at by Courts in India—interference by Privy Council.

When the Courts in India have concurred in finding that a certain grant was not permanent and was inalienable the Privy Council will not in appeal interfere with such findings. (*Sir John Walters.*)

BROJOSUNDAR DEB vs. RAMCHANDRA PAIKARA & ORS.

17 P.L.T. 53

Appeal—(Contd.)

Difference between judgment on appellate side and final order on appeal.

There is a vast difference between an order made or a judgement passed on the appellate side of a Court and the final order passed in appeal. The latter may be included in the former but the former is necessarily not the same as the latter. 41 Cal. 388 dissented from; (*Wort A. C. J. & Dharle J.*)

KRISHA CH. DEB vs. RAJENDRA NARAYAN BIRANJ DEO.

15 Pat. 659=17 P.L.T. 760=A.I.R. 1936 Pat. 465=164 I.C. 287

Award—Effect of a valid award.

A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and the award furnishes the only basis by which the right of the parties can be determined. (*Abdul Rashid & Addison JJ.*)

DAMODAR DAS & CONS, LTD., vs. L. BASHESHA NATH & ORS.

A.I.R. 1936 Lab. 865.

Award—Mistakes in award, if can vitiate the same

Where parties have selected their arbitrator and have agreed to accept the decision of the arbitrator, they will be bound by the decision, even if there were mistakes in it, unless such mistakes are so palpable and gross as to afford strong evidence of misconduct. (*Pollock J.*)

TULSIRAM & ANR, vs. JHANAKIAL & ANR.

I.L.R. 1936 Nag. 44=161 I.C. 546=31 N.L. (Sup. 13)=19 N.L.J. 151=A.I.R. 1935 Nag. 197.

Award Failure of Court to specify time for submission of award, if renders the award defective.

Where the Court leaves it to the discretion of the arbitrator to complete his award within a reasonable time and this is done, the validity of the award cannot be chal-

Award—(Contd.)

lenced on the ground that the Court did not fix any time within which the award was to be submitted. There can be no substantial miscarriage of justice merely because of the failure of the Court to specify a date for the submission of the award. (*Baguley & Mosley JJ.*)

MA NGWE & ANR vs. U. MIN SIN & ORS.

A.I.R. 1936 Rang. 240 = 163 I.C. 590.

Award Arbitrator asked to partition property giving cash to one and movables to another—award, if proper.

Where an arbitrator is appointed by parties to divide movable and immovable properties between them, and the arbitrators award the immovable property to one and the cash and movables to another, the award is not improper and cannot be set aside by the Court. The arbitrator has power to divide the property in any way he thinks fit, and even if the shares are not uniform or equal, that does not give the Court power to interfere. (*Pollock J.*)

TULSHIRAM & ANR vs. JHANAKAL & ANR.

I.L.R. 1936 Nag. 44 = 165 I.C. 556 = 31

N.L.R. (Sup.) 132 = 19 N.L.J. 151 = A.

I.R. 1936 Nag. 197.

Award—Vouchers alleged to have been signed by minors—Objection raised before Court but not before arbitrator that vouchers unlawfully admitted—Objection, if can be entertained by the Court.

After filing an award in Court an objection was raised that certain vouchers taken into consideration had been signed by a minor, and should have been disallowed after an enquiry as to the age of the alleged minor which enquiry not having been made, the award was vitiated. The objection had not been raised before the arbitrators. Held, that under the circumstances the arbitrators were not bound to anticipate or guess any possible objections that might be made and then to investigate such objections. Even assuming that the person

Award—(Contd.)

who signed the vouchers was a minor, the arbitrators were not bound to hold that legally the objectors were not bound to pay the amount due on such vouchers. The absence of an enquiry on the part of the arbitrators did not under the circumstances amount to judicial misconduct vitiating the award. (*Jaisil J.*)

RAMDHAN DAS RAMJIDAS vs. SANKER DAS DEBIDOLAL.

A.I.R. 1935 Lah. 492 = 164 I.C. 296

Award—Decree passed on award, if appealable on the ground of award being invalid.

When a decree is passed on the basis of an award no appeal can be preferred against the decree itself on the ground that the award was not a valid one. 12 Rang. 675 & 29 Cal. 167 relied on. (*Baguley & Mosley JJ.*)

MA NGWE & ANR. vs. U. MIN SIN & ORS.

A.I.R. 1936 Rang. 240 = 163 I. C. 590.

Award—Parties taking part in arbitration proceedings after expiry of date fixed for filing of award—consent of parties, if may be inferred—Validity of the award.

An arbitrator is a domestic tribunal, and the parties who refer their dispute to him for decision, can, by mutual consent which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator and in the submission of his award beyond the date fixed by the Court for returning the same. Such a consent would be inferred where the parties conduct the case and take a willing part in the proceeding before the arbitrator, though the date fixed for filing of the award had expired. 50 I. C. 52 followed. (*Agha Haidar J.*)

ASA vs. MT. VHURAL.

A.I.R. 1936 Lah. 466 = 163, I.C. 380 = 38 P.L.R. 725.

Award—Unregistered award, if admissible in evidence.

Award—(Contd.)

An award, even if not registered, is admissible in evidence. 51 All. 659 relied on. (*Agha Haidar J.*)

OFFICIAL RECEIVR, GUJRANWAL & OR vs. ABDUL WAHID & ANR.

A.I.R 1936 Lah. 877

ARBITRATION.

Duty of arbitrator—Arbitrator, if bound to keep record of his enquiry.

An arbitrator is of course bound to make enquiry, but he is not bound to keep a record of such enquiry. There is no law which requires an arbitrator to keep a record of his proceedings. All that is necessary is that there should be an award in writing by the arbitrator. (*Jailal J.*)

RAMDHAN DAS RAMJIDAS vs. SANKER DAS DEBIDOVAL.

A.I.R 1936 Lah. 492 = 164 I.C 296 = 100

Revocation of reference—Relationship of arbitrator with one of the party, if a ground for revocation of the reference to arbitration.

Where after a suit had been referred to arbitration, it transpired that the arbitrator was working in the firm of one of the parties to the arbitration, held, that this fact constituted a proper ground on which the other party could apply for revocation of the reference to arbitration, and the Court should in such circumstances cancel the arbitration proceedings. (*Skemp J.*)

KARAM DIN vs. MAHAMMAD DIN & ORS.

38 P.L.R 480

ARBITRATION ACT (IX of 1899)

Sec. 19—*Order rejecting application for stay of suit on the ground of important questions of law being involved—such order if open to revision by the High Court.*

An order rejecting an application under Sec. 19, Arbitration Act for stay of suit and for referring the matter in dispute to arbitration, on the ground that important questions of law are likely to arise in the proceedings which can be better decided by the

Arbitration Act—(Contd.)

Court than by arbitration, cannot be said to be an order passed in the illegal exercise of jurisdiction. Such an order therefore is not open to revision by the High Court. (*Jai Lal J.*)

S.K. LAUL vs. GANGA SAGAR CORPORATION, LTD. ANR.

163 I.C. 854 = 31 P.L.R. 846

ASSAM BIJNI SUCCESSION ACT (II of 1931.)**Sec. 1—Scope of the Act.**

The legislature in passing the Bijni Succession Act has passed no provision for forfeiting or confiscating the property of any person. It has merely declared a rule of succession which according to it is the customary law and has only supplemented that law where in its view, it needed supplementary. (*Mukherjee & S. K. Ghosh J.J.*)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB & ORS.

A.I.R 1936 Cal. 59

Sec. 1—Bijni Succession Act, if can be regarded as a public Act.

The Bijni Succession Act, even though it may be regarded as local and personal in some of its aspects, is none the less a public Act. Merely because an Act is a local or personal Act, as being confined to certain local limits and as affecting the status of a particular description of persons only, it does not cease to be a public Act if it is the product of the legislature in its legislative capacity and is not the result of a procedure in which the legislature is called to enact a law embodying a conclusion arrived at by it judicially or upon the basis of a contract as between rival parties for whose benefit the law is intended. If from the general tenor of the Act it appears that it purports to determine the status individuals not merely interest, but as governing their relations with others, the Act, can hardly be regarded as a private Act. (*Mukherji & S. K. Ghosh J.J.*)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB & ORS.

A.I.R 1936 Cal. 593

Assam Bijni Succession Act—(Contd.)**Sec. 4 (1) & (2)—Scope of the Act,**

The Bijni Succession Act, 1931, is confined to the Succession to the Raj and any title otherwise than on the basis of succession, which anybody may have to the properties of the Raj or any portion thereof, is clearly outside the scope and purview of the enactment. The only title that Sub Secs. (1) & (2) of Sec. 4 purport to declare and the only title which Sec. 8 speaks of, is title as holder of the Raj on the basis of succession either by nomination or by appointment and no title based on any other ground. (*Mukherji & S. K. Ghosh JJ*)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB & ORS.

A.I.R. 1936 Cal 593

Sec. 4 (1) & (2)—Act, if operative outside the limits of Assam.

The Bijni Succession Act applies to the status of the holder of the Raj wherever the properties appertaining to the Raj may be situate, and the Assam Legislature intended the Act to operate outside the territorial limits of the province of Assam, and the legislature was within its authority in legislating on that footing. (*Mukherji & S. K. Ghosh JJ*.)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB & ORS.

A.I.R. 1936 Cal, 593

ASSAM MUNICIPAL ACT (I of 1923)

Sec. 13, proviso—Suit for declaration of validity of plaintiff's nomination and invalidity of election of defdts, if lies in civil court when Election Tribunal set up
Jurisdiction of Civil Court when Special Tribunals set up under special statute—person, if may maintain suit in civil court after failure in Election Tribunal.

A question of the validity of the nomination is a question of the qualification of a candidate, and with regard to such questions at least, the jurisdiction of the civil court is saved by the proviso to Sec. 13 Assam Municipal Act. Therefore, a suit for a declaration that the plaintiff was duly nomi-

Assam Municipal Act—(Contd.)

nated as a candidate for election to the Municipal Board and that the election of his rivals is not valid, lies in the civil Court even though election Tribunals may have been set up. If, however, a person has approached the Election Tribunal without success, he may be debarred on the principle of election of remedies to reargue the same matter in the civil court, (*Guha & Bartley, JJ.*)

GOPESH CH. ADITYA vs. BENODE LAL DAS.

40 C.W.N. 553=165 I.C 606 (2)—A.I.R. 1936 Cal, 424

ASSAM MUNICIPAL ACT RULES.

R. 13—Nomination paper sent to third party although sent back by such third party to chairman, if valid.

R. 13 of the Assam Municipal Rules is not satisfied, and there is no valid nomination when the nomination paper is sent not to the Chairman as required by the rule, but to the Magistrate although the latter may in fact send it back to the Chairman. (*Guha & Bartley JJ.*)

GOPESH CHANDRA ADITYA vs. BENODE LAL DAS.

40 C.W.N. 553 165 I.C 606 (2) A.I.R. 1936 Cal 424

R. 13 Nomination paper to be sent to Chairman at least 15 days before date of election—Such paper sent to Chairman on 5th April for election fixed for 18th. when Municipal Office closed from March 30th to April 4, within time.

The provision of R. 13 of the rules made under the Assam Municipal Act being that a candidate shall send his nomination papers to the Chairman by a date not later than 15 days before the date fixed for election, a nomination paper reaching the Chairman on the 5th April for election fixed to be held on the 18th cannot be held to be in time by application of Sec. 14 of the Assam General Clauses Act, even though the Municipal Office may have remained closed from the

Assam Municipal Rules Act—(Contd.)

30th March to the 4th April. (*Guha & Bartley JJ.*)

GOPESH CHANDRA ADITYA vs. BENODE LAL DAS.

40 C.W.N. 553=165 I.C. 606 (2)=
A.I.R. 1936 Cal. 424

ASSAM LAND & REVENUE REGULATION (I of 1936)

Sec. 6 b)—"Legally derived right"—
Right by adverse possession if included.

A right founded on adverse possession for more than the statutory period is a right legally derived, within the terms of Sec. 6 (b) (*D. N. Mitter & Rau JJ.*)

SECY. OF STATE vs. BRAJENDRA KISHORE RAI CHOWDHURY.

A.I.R. 1936 Cal. 629

Sec. 8 (b)—Acquisition of right of landholder if depends on the length of possession.

The acquisition of the rights of a landholder under the Assam Land and Revenue Regulation is not dependent on the length of possession under the lease but on the lessee's holding under a lease which is given for a term of 10 years. Sec. 8. cl. (b) of the said Regulation does not make it obligatory on the lessee occupying the land for 10 years before he can acquire the status of a landholder. (*D. N. Mitter & Patterson, JJ.*)

KRISHNA PROSAD ROY CHOWDHURY & ANR. vs. SECRETARY OF STATE FOR INDIA.

63 C.L.J. 52=A.I.R. 1936 Cal. 774

Sec. 32, 35, 39, & 62—Person obtaining settlement in violation of the rights of a landholder, if liable to the latter for mesne profits.

A person who obtains a settlement of land from the Settlement Officer and takes possession of the same in violation of the rights of another, who having been in previous possession was entitled to obtain settlement under Sec. 32 (1) of the Assam Land and Revenue Regulation, is liable to

Assam Land & Revenue—(Contd.)

the latter for mesne profits for the period of his possession. (*R. C. Mitter J.*)

DHANAI NAMAQUIT vs. HAJI NIYAMATULLA.

62 Cal. 1053=163 I.C. 102

Secs. 69 & 82—Suit to set aside sale on ground of non-compliance with the provision of Sec. 69, if suit within Sec. 82.

A suit to have a sale set aside on the ground that the procedure laid down in Sec. 69 of the Assam Land & Revenue Regulation has not been complied with, is a suit within the provisions of Sec. 82, sub-sec. (2) and would be barred if the conditions of that section are not satisfied. (*Mukherji & Jack, JJ.*)

SADHIRAM ATOI vs. KUNJA BEHARI BANERJI.

40 C.W.N. 1359=A.I.R. 1936 Cal. 715

Secs. 80 & 82—Order of confirmation of sale if necessary—Limitation for suit for setting aside sale, when order of confirmation passed.

Where a sale has become final under the Regulation, it is not necessary to have an order of confirmation of sale. If such an order is in fact passed limitation does not begin to run from the date of such order but runs from the date when the sale becomes final (*Mukherji & Jack JJ.*)

SADHIRAM ATOI vs. KUNJA BEHARI BANERJI.

40 C.W.N. 1359=A.I.R. 1936 Cal. 715

Sec. 82 (2)—Two conditions mentioned in the sub section, if both must be satisfied.

The word "or" in Sub-sec. (2) of Sec. 32 of the Assam Land and Revenue Regulation means "and", and the two conditions mentioned therein before a suit can be instituted in a Civil Court must both be satisfied. (*Mukherji & Jack JJ.*)

SADHIRAM ATOI vs. KUNJA BEHARI BANERJI

40 C.W.N. 1359=A.I.R. 1936 Cal. 715

Assam Municipal Act.—(Contd.)

Sec. 154—*Temporary settlement and offer of resettlement, if must be of the whole estate.*

The Assam Land and Revenue Regulation does not contemplate the partition of an estate except in the manner provided for in the provisions regarding partition as embodied in Ch. (6) of the Regulations; and a temporary settlement of a part of the estate, viz, the heels is in contravention of the provisions of the Regulation making the action of the Settlement Officer *ultra vires* of the statute. Similarly offer of resettlement should be of the whole estate. (*D. N. Mitter & Rau, JJ.*)

SECRETARY OF STATE vs. BRAJENDRA KISHORE ROY CHOUDHURY

A.I.R. 1936 Cal. 629

Sec. 154—*Land Revenue Settlement—propriety of classification and suitability of rent by whom to be decided.*

From the beginning of the Land Revenue Settlement it has been an invariable rule of law that at every new settlement there must be a new classification and a new rate of assessment to be determined by the Settlement Officer under the direction of the Government and with its approval. Government is the sole judge of the propriety of the classification and suitability of the rate, and the amount of revenue settled by the Government Officer is final. (*D. N. Mitter & Rau JJ.*)

SECRETARY OF STATE vs. BRAJENDRA KISHORE ROY CHOUDHURY & ORS.

A.I.R. 1936 Cal. 629

Sec. 154 (1) (a)—*Composite proceedings partly settlement and partly partition—Civil Court, if can pronounce such proceedings ultra vires.*

Although the validity of a mere settlement cannot be questioned in a civil Court under Sec. 154 (1) (a), there is no bar to the Civil Court pronouncing a composite proceeding partly a settlement and partly a partition entirely foreign to the Regulation to be *ultra vires*. (*D. N. Mitter & Rau JJ.*)

SECRETARY OF STATE vs. BRAJENDRA KISHORE ROY CHOUDHURY.

A.I.R. 1936 Cal. 629

ATTACHMENT

Property in custody of Court—precept received for attachment—date from which attachment takes effect.

When a precept is received for the attachment of a property in the custody of the Court, the attachment takes effect from the date when it is received by the Court holding the property, and the refusal of the presiding officer to acknowledge the attachment cannot affect the validity of an attachment which would be otherwise good. (*Becket JJ.*)

KHAZAN CHAND vs. MOTI SINGH & ANR.

A.I.R. 1936 Lah. 914 = 161 I.C. 418

Attachment—Attachment of property in the custody of the Court—procedure to be observed after the attachment.

When the attached property is money, the custody Court must hold it at the disposal of the attaching Court and must make it over to that Court when called upon to do so. When the money in the custody of Court is subject to more attachments than one, the Court must award priority to the first in point of time, and if the other decree-holders want to share in the rateable distribution, they must apply for it to the first attaching Court. (*Becket J.*)

KHAZAN CHAND vs. MOTI SINGH & ANR.

A.I.R. 1935 Lah. 914 = 161 I.C. 418

BANKING.

Relationship between banker and customer.

The relationship of banker and customer is generally that of agent and principal, of debtor and creditor, or of pledgor and pledgee; there are however cases where the banker stands in the relation of a trustee as well as agent for his customer. The banker is not a trustee for his customer in respect of money paid in the Bank; nor is he responsible to the customer for the use the latter makes of such money. The position however is not the same where the banker uses securities deposited with him for his own use, and where there is conversion of the securities for the purposes of the bank

Banking—(Contd.)

and not for the purpose of the customer. In such circumstances the bank is certainly liable as for conversion. (*Guho & Bartley JJ.*)

BANK OF DACCA, LTD. vs. GOURGOPAL SAHA.

A.I.R. 1936 Cal. 409

Sale of securities in payment of loans due to the bank—Customer if entitled to balance money.

A customer who had deposited Government promissory notes in a Bank as securities to cover overdrafts or advances is entitled after such securities have been sold by the bank for payment of the loans for which they are securities, to enforce his ownership to the amount in the hands of the bankers. (*Guho & Bartley JJ.*)

BANK OF DACCA, LTD. vs. GOURGOPAL SAHA.

A.I.R. 1936 Cal. 409

BAR COUNCILS ACT (XXXVIII OF 1936).

Sec. 10—Case referred for enquiry to Bar Council—Tribunal constituted—Duty of the Tribunal.

Per Bennet & Ganganath, JJ.—The judgment and evidence given in a civil suit filed by a party against an advocate are admissible as evidence in an enquiry against the advocate under the Bar Councils Act but the judgment and decree are not conclusive proof.

Per Iqbal Ahmed, J.—When a case is referred to the Bar Council under Sec. 10 of the Bar Councils Act for enquiry into the conduct of an advocate, it is the duty of the Tribunal to enquire into the matter and to record a finding on the materials produced before it, irrespective of any finding on the point recorded by a civil court.

IN THE MATTER OF AN ADVOCATE.

1936 A.L.J. 379 = 1935 A.W.R. 1229 = 1935 Cr.C. 1225 = 159 I.C. 561 = A.L.R. 1935 A.H. 1023

Sec. 10 (1) — Professional or other misconduct—meaning of.

Bar Council Act.—(Contd.)

The words "professional or other misconduct" in Sec. 10 (1) of the Indian Bar Council's Act should be read in their plain and natural meaning, the legislature thereby intending to confer on the Court disciplinary jurisdiction to take action in a case of misconduct professional or otherwise. The word 'may' in the sub-section however, gives the Court unfettered discretion to take action in suitable cases only and the discretion must be exercised judicially. (*Mukherjee A. C. J. Lord Williams & S. K. Ghosh, JJ.*)

IN THE MATTER OF AN ADVOCATE.

40 C.W.N. 366

Sec. 10 (1) —Discretion of the Court, how and when to be exercised.

Subject to the limitation that no hard and fast rule can or ought to be laid down fettering the Court's discretion, a very sound and workable test to apply in most cases and to all branches of the provision is to determine whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted or unfit to be entrusted with the responsible duties that an advocate is called upon to perform. (*Mukherjee, A. C. J. Lord Williams & S. K. Ghosh JJ.*)

AN ADVOCATE, IN THE MATTER OF.

63 Cal. 867 = 40 C.W.N. 366 = 162 I.C. 179 = A.I.R. 1936 Cal. 158 = 1936 Cr.C. 321 = 37 Cr.L.J. 534

Sec. 10 (1)—Criminal conviction, if prima facie evidence of misconduct and if always a ground for disciplinary measure.

While conviction for a criminal offence is prima-facie evidence of misconduct, all criminal convictions are not grounds for the exercise of the Court's disciplinary jurisdiction. A mere conviction under Sec. 124A Penal Code, does not necessarily involve the removal or suspension of a legal practitioner, but the Court must ascertain and take into consideration the facts on which the con-

Bar Council Act—(Contd.)

viction is based. (*Mukherjee, A. C. J. Lord Williams, & S. R. Ghosh, JJ.*)

AN ADVOCATE, *In The Matter of.*

63 Cal. 867 = 40 C.W.N. 366 = 162 I.C. 170 = 37 Cr.L.J. 534 = 1936 Cr.C. 321 = A.I.R. 1936 Cal. 158

Sec. 10 (1)—*Disciplinary jurisdiction if may be exercised by way of supplementary punishment.*

The disciplinary jurisdiction vested in the Courts should not be employed merely to the need of the criminal law of the land and merely to supplement as it were, by way of further punishment, the punishment which the advocate himself has received under the law for the misconduct of which he has been guilty. (*Mukherjee, A. C. J. Lord Williams & S. R. Ghosh JJ.*)

AN ADVOCATE *In The Matter of.*

63 Cal. 867 = 40 C.W.N. 366 = 162 I.C. 170 = 37 Cr.L.J. 534 = 1936 Cr.C. 321 = A.I.R. 1936 Cal. 158

Secs. 12 (4) & 10—*Finding of the Tribunal of Bar Council—Finding put up for consideration before Bench of three Judges—Majority reverse the finding and suspend advocate—Opinion of majority if must prevail.*

Where on receipt of the finding of the Tribunal of the Bar Council that the charge against the Advocate concerned were not proved and he was not guilty of professional misconduct, the finding is put up before a Bench of three Judges for consideration, and the majority of the Judges disagreeing with the finding of the tribunal suspend the advocate from practice for six months, the opinion of the majority must prevail under Cl. 27 of Letters Patent, Allahabad High Court. Claus. 8 of the Letters Patent confers jurisdiction on the High Court to remove or suspend advocates, whereas Sec. 10, Bar Councils Act, lays down the procedure according to which such jurisdiction should be exercised.

AN ADVOCATE *In The Matter of.*

58 All. 406 = 1936 A.L.J. 383

BENAMI.

Nature of Benami Transaction.

A Benami transaction is a perfectly genuine transaction which is legally enforce-

Benami—(Contd.)

able, and the term benami should not be regarded as being equivalent to not genuine. So also to speak of a benami gift is a contradiction in term for either there was a gift in which case the donee obtained title to the property, or there was not a genuine or valid gift, and if that was the case the property never passed from the donor to the donee. (*Page C. J., Baguley, Mosely, Ba U & Dunkley JJ.*)

MAUNG TUN PE & AR. vs. B. K. HALDER & ORS.

14 Rang. 242 = A.I.R. 1936 Rang. 256 = 163 I.C. 211

Conveyance taken by parents in name of children—children claiming the conveyance to have been in their favour—burden of proof of advancement.

The doctrine of intended advancement is not in consonance with either the sentiments or the practices of the Burmans. And such a doctrine does not form part of the law of the land. Where therefore certain lands were purchased by their parents with their own money in the name of their children, the doctrine of intended advancement cannot be a vailed off by the children for establishing the fact that the conveyance was really intended to be for the benefit of the children. The burden is on the children to prove that the conveyance which must *prima facie* be presumed to have been made for the benefit of the real purchaser was in fact intended to operate solely for the benefit of the children. 6 M. I. A. 53 followed. 4 Rang. 522, 6 Rang. 203 & 7 Rang. 751 overruled. (*Page C. J., Baguley, Mosely, Ba U. & Dunkley JJ.*)

MAUNG TUN PE vs. B. K. HALDER.

14 Rang. 242 = A.I.R. 1936 Rang. 256 = 163 I.C. 211

Production of title deeds—custody discussed.

In considering a question of Benami a judge is not bound to come to the conclusion, in the event of a document being produced from the custody of the person

Benami—(Contd.)

asserting that title that his case is made out. (*Wort & Rowland JJ.*)

MST. BIBI ZAINAB vs. MAHAMMAD AYUB & ORS.

17 P.L.T. 366 = 161 I.C. 331 (2) = A.I.R. 1936 Pat. 136

BENGAL, AGRA & ASSAM CIVIL COURTS ACT (XII OF 1887).

Sec. 37—Parties Mahomedans— Family custom altering personal law, if can be proved.

Where the parties are Mahomedans the Civil Courts in these provinces are not bound to follow the Mahomedan Law, and a family custom which alters the personal law of the parties, even though not in accordance with the strict Mahomedan Law, can be allowed to be proved under Sec. 37, Bengal, Agra and Assam Civil Courts Act, 17 C. W. N. 97 relied on; 23 All. not followed. (*Sulaiman C. J. & Bennet J.*)

MST. JAFFO vs. CHHITTA & ORS.

1936 A.L.J. 493 = 1936 A.W.R. 449 = 163 I.C. 650 = A.I.R. 1936 All. 443

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825).

Sec. 3 & 4—Accretion thrown up by river—custom of deep stream rule and accretion belonging to zaminder proved—Sec. 4, if applies.

Where the custom of the deep stream rule and accretion belonging to the zamindars is proved to exist, Sec. 4 of Regulation XI of 1825, has no application, as provided by that Regulation in Sec. 3; and a person owing a particular plot has no right whatever to the accretion, thrown up and added by the river to his plot. (*Bennet & Smith JJ.*)

KESHAVA PROSAD SINGH vs. MST. BENI KUNWAR & ORS.

A.I.R. 1936 All. 631 = 1936 A.W.R. 723 = 1936 A.L.J. 1058 = 164 I.C. 877

Sec. 4—Gradual accretion to estate of one of riparian owners—land identifiable as

Bengal Alluvion & Diluvion—(Contd.)

belonging to another—land to whom must be deemed to belong.

Under Sec. 4 of Bengal Regulation XI of 1825, as interpreted by the Privy Council, if the land which was gradually accreted to the estate of one of the real proprietors can be identified as the land belonging to another such proprietor, the latter shall be deemed to continue to be the owner thereof, in spite of the accretion having been gradual. 6 Pat. 481 followed; 12 Rang. 136 distinguished. (*Niamatullah & Collister JJ.*)

SRI KISHAN DUTT vs. AHMADI BIRI & ORS.

57 All 589

BENGAL CESS ACT (IX OF 1880).

Sec. 4—Cultivating ryot—Meaning of—Ryot, if may be a tenure-holder.

The distinction in the Cess Act is between a tenure-holder and a cultivating ryot. A ryot may be a tenure-holder for the purposes of the Sees. Act; and in order to have the privileges of a cultivating ryot, a person must be an actual cultivator of the soil. 15 C. L. J. 428, 32 C. W. N. 610 followed. (*Guha & Bartley JJ.*)

JITENDRANATH RAY vs. SECRETARY OF STATE FOR INDIA.

40 C.W.N. 630 = 62 C.L.J. 541 = 161 I.C. 210 (2) = A.I.R. 1936 Cal. 701

Secs. 4 & 24—Notes to Sec. 24 & 66 in Bengal Cess Manual, if inconsistent with definition of "cultivating ryot"

The note to Sec. 24 of the Bengal Cess Act and r. 66 in the Bengal Cess Manual are not ultravires, they being consistent and not inconsistent with the definition of "cultivating ryot" in Sec. 4 of the Act. (*Guha & Bartley JJ.*)

JITENDRANATH RAY vs SECRETARY OF STATE FOR INDIA.

40 C.W.N. 630 = 62 C.L.J. 541 = 161 I.C. 210 (2) = A.I.R. 1936 Cal. 70

BENGAL CESS ACT (IX OF 1880).

Sec. 5—Road cess, how assessed in the case of mines.

The Bengal Cess Act provides for the imposition of a cess on all immovable property situated in the province. For the purposes of the Act, mines, etc., are included in the definition of "immovable property." In the case of mines the cess is assessed on the annual net profits of which the royalty receivable by the landlord is a part. It is therefore a cess imposed on the mines. (*Nasim Ali & Edgley JJ.*)

BENGAL COAL CO., LTD. vs. KISHORE LAL SINGH DEO & ANR.

40 C.W.N. 1118 = A.I.R. 1936 Cal. 459

Sec. 16—Non-service of notice under, if invalidates assessments.

Service of notice under Sec. 16 of the Bengal Cess Act, is not merely a matter of procedure but a substantive and imperative provision upon which the validity of the assessment depends. An assessment without service of notices is ultravires and invalid. (*Guha & Bartley JJ.*)

JITENDRANATH RAI vs. SECRETARY OF STATE FOR INDIA.

40 C.W.N. 630 = 62 C.L.J. 541 = 161 I.C. 210 (2) = A.I.R. 1936 Cal. 70

BENGAL CHOWKIDARI ACT (VI OF 1887).

Chowkidari Chakran land resumed and settled by Collector with plaintiff—claim by plaintiff for fair and equitable rent - peshkash included in jama—right to realise peshkash given to Mokraridar—proprietor if can ask for fixing fair rent.

The plaintiff was the proprietor of an estate to which the Chowkidari Chakran land appertained. The defendant was the Mokraridar in respect of the land by virtue of some grants made by the predecessor in interest of the plaintiff. The lands were resumed and settled by the Collector under the Chowkidari Act (VI of 1870) with the plaintiff. The plaintiff after taking settlement from the Collector made new settlement of these lands with certain persons and instituted suits for settlement of fair and

Bengal Chowkidari Act—(Contd.)

equitable rent in respect of these lands. The defendants contended that in the Mokrarari grant in respect of the lands, the peshkash of the Chowkidari Chakran land, had been taken into consideration in fixing the jama of the Mokrarari, and the landlord was not entitled to get additional rent for the chakran lands. *Held*, that the grants did not stand in the way of the Zamindar's claim to get fair and equitable rent for the disputed lands. (*Nasim Ali & Henderson JJ.*)

Hrishikesh Law & Anr. vs Satish Ch. Pal.

A.I.R. 1936 Cal 203

Secs. 51 & 55—Prohibition contained in the section if extends to litigation already in progress when and estate is taken charge of by Court of Wards.

Sec. 55, Bengal Court of Wards Act in terms simply prohibits initiation of limitation on behalf of a ward by the Manager except with the authorisation of the Court of Wards. There is no indication that the prohibition is to extend to litigation of the Wards which is already in progress and the Court of Wards assumes charge of estate of the wards. The Act sufficiently provides for such a case in Sec. 51 under the provisions of which the Manager is to be named as next friend or guardian for the suit and to represent the ward. Therefore the mere fact that an estate is taken over by the Court of Wards during the pendency of a suit which was instituted before the estate was taken over by the Court of Wards cannot take away the jurisdiction of the Court to try the suit by reason of the suit having been instituted without the permission of the Court of Wards. (*Macpherson & Dhavle JJ.*)

MST. LAIKUNNISSA & ORS vs. DURGA-DAS MUKHERJEE & ORS.

15 Pat. 382 = A.I.R. 1936 Pat. 114 = 161 I.C. 18 = 17 P.L.T. 118

Sec. 55—Prohibition contained in section, if extends to litigation already in progress when Court of Ward assumes charge of the estate of the ward.

Section 55 of the Bengal Court of Wards Act simply prohibits initiation of

Bengal Chowkidari Act—(Contd.)

litigation on behalf of a ward by the Manager except with the authorisation of the Court of Wards. There is no indication that the prohibition is to extend to litigation of the ward which is already in progress when the Court of Wards assumes charge of the estate of the ward. (*Macpherson & Dhavle JJ.*)

MST. LAIKUNISSA & ORS, vs. DURGA DAS MUKHERJEE.

15 Pat. 382=17 P.L.T. 118=A.I.R. 1936 Pat. 114=161 I.C., 18

BENGAL ESTATES PARTITION ACT (V OF 1897).

Sec 7—Suit for partition—‘Bakasht’ lands divided but lands in occupation of tenants not divided—effect of.

Where in a suit for partition it was an admitted fact that the Bakasht lands of the estate were divided sometimes previously, but that the lands in the occupation of the tenants were not divide although each of the *Pattidars* collected has share of the rent from the tenants separately, held, that this finding amounted to a finding that there was a complete partition of the proprietary interest, and therefore could not be a partition made by the Civil Court. (*Agarwalla & Varma JJ.*)

MUKUND JHA vs. DHARUP NARAIN JHA.

17 P.L.T. 104=A.I.R. 1936 Pat. 77=160 I.C. 921 (1)

Sec. 81—Order by partition officer under the section, how can be challenged.

An order passed by a Deputy Collector which acting under Sec. 81, Estates Partition Act, exercising the power of a quasi-judicial officer, can not be challenged by way of defence to a suit for rent, in the absence of the other parties to the partition. It can only be challenged by a suit or proceeding in which all the parties to the partition are parties. 29 C. W. N. 221 followed. (*Jack J.*)

NABENDRA KISHORE RAO vs. KERAMAT ALI MUNSHI & ORS.

A.I.R. 1936 Cal. 63=161 I.C. 214

Bengal Estates Partition Act—(Contd)

Sec. 81 (3)—Presumption of due service of notice and of regularity of proceedings in partition.

In case of a partition of an estate the presumption is that the proceedings were regularly held, and that the regular notice as required by Sec. 81 (3) of the Estates Partition Act had been duly served. (*Jack J.*)

NABENDRA KISHORE ROY vs. KERAMAT ALI MUNSHI & ORS

A.I.R. 1936 Cal. 63=161 I.C. 214

BENGAL LAND REGISTRATION ACT (VII OF 1876 .

Sec. 38—Object of registering names of proprietors or managers—opening account in the name of Shebait when deity is the proprietor, if ‘ultra vires.’

The object of registering the names of proprietors or managers, etc., under the Bengal Land Registration Act is not to make an inquisition into titles either in revenue paying or revenue-free properties, but to keep proper record of necessary titles in landed properties so as to have a knowledge of the person who are in actual possession and are responsible for the discharge of their duties. Therefore the opening of separate accounts in the name of shebait where the deity is the actual proprietor of an estate, is not *ultra vires*. (*Mukherji & S. K. Ghosh JJ.*)

MANINDRA DEB ROY vs. HANSESWARI THAKURANI & ORS.

63 Cal. 629=40 C.W.N. 271

Secs. 52 & 56—General notice by collector for registration of applicant's name—matter for decision by collector—reference to Civil Court made irregularly—jurisdiction if affected.

When an application is made for registration of a name under the Land Registration Act, a notice, which is a general notice is issued by the Collector and on the day mentioned in that notice the Collector or his Deputy proceeds to consider the objections to the application. The only question that the Collector has to consider is the question of possession. When the

Bengal Land Registration Act—(Cont.)

Collector refers the matter to the Civil Court, but in an irregular manner, it does not affect the jurisdiction of the Civil Court. (*Wort J.*)

SRI SRI NABAIN THAKUR vs. KAMAL-RANI DEBI.

17 P.L.T. 414=159 I.C. 821=A.I.R. 1936 Pat. 167

Secs. 55 & 78—*Entry in the Collector's register, if constitutes evidence of possession*

Sec. 78 of the Bengal Land Registration Act provides that no person whose name is not entered in the Register can maintain a suit for recovery of rent. Therefore when the statutory provision makes a person whose name has been entered in the register the person exclusively entitled to recover rent, the entries should be held to be evidence that the person whose name appears in the register is the person who is in possession of the property. (*James & Agarwalla, JJ.*)

EKRAM HOSSAIN vs. ALI HOSSAIN.

17 P.L.T. 423

Sec 78—*Entries in Register if conclusive evidence of possession.*

The registers maintained by the Collector under the Land Registration Act purport to be a record of possession of the persons whose names are so entered. Sec. 78 provides that no person whose name is not entered in the register can maintain a suit for recovery of rent. Thus, when this statutory provision makes the person whose name is entered in the Register the person exclusively entitled to recover rent the entries should be held to afford evidence that the person whose name appears in the Register is the person who is in possession of the property. (*James & Agarwalla JJ.*)

EKRAM HASSAN vs. SYED ALI,

17 P.L.T. 423

Sec 78—*Cosharer in possession of larger share than his registered share in one mouja and lesser share in another, if debarred from suing for rent in respect of larger share held by him.*

Bengal Land Registration Act—(Contd.)

A co-sharer who by an amicable arrangement among the co-sharers has been in possession of a larger share than his registered share in some Moujas of an estate and lesser share or no share in other moujas is not debarred from obtaining a decree for the rent due to him so long as the total interest which he holds in all the moujas represents his registered interest in the entire estate. 30 Cal 773 followed. (*Rowland J.*)

LAL BEHARI SINGH vs. MAHABIR MAHTON & ORS.

A.I.R. 1936 Pat. 414=163 I.C. 522.

Sec 81—*Application of the section—Unregistered proprietor, if may recover rent on strength of written contract between own predecessor and predecessor of tenant.*

Sec. 81 of the Bengal Land Registration Act applies to a case where the parties are successors in interest of the contracting parties. Consequently an unregistered proprietor can recover rent from a tenant on the strength of a written contract between his predecessor and the tenant. (*Jack J.*)

SATVENDRA NATH MANDAL vs. NANDA-LAL CHOWDHURI.

40 C.W.N. 585

BENGAL LAND REVENUE SALES ACT (IX OF 1859).

Sec. 5—*Notice under the section, if necessary when attachment not known to Collector.*

A notice under Sec. 5, Bengal Land Revenue Sales Act is imperative when the estate notified for sale is under attachment by a Civil Court even though the fact of such attachment may not be known to the Collector. The propriety of the attachment is not material; it is the fact of attachment which matters. (*Mukherji & S. K. Ghosh JJ.*)

MANINDRA DEB RAI vs. HANSESWARI THAKURANI & ORS.

63 Cal. 629=40 C.W.N. 271

Secs. 5 & 8—*Non-service of notice—defect if cured by Sec. 8.*

Bengal Land Revenue Sales Act—(Contd.)

Sec. 8, Bengal Land Revenue Sales Act cures only defect in service by posting of notices, but the section has no application when no order is passed for the issuing of such notices and none is actually issued. (*Mukherji & S. K. Ghosh JJ.*)

MANINDRA DEB RAI vs. HANSESWARI THAKURANI & ORS.

63 Cal. 629=40 C.W.N. 271

Secs. 5 & 33—Sale held without notice under Sec. 5—effect of.

When a sale is held without the notice contemplated by Sec. 5, Bengal Revenue Sales Act, the sale is not nullified but is held "contrary to the provisions Act" within the meaning of Sec. 33 of the Act and cannot be set aside only on the ground of substantial injury. (*Mukherji & S. K. Ghosh JJ.*)

MANINDRA DEB RAI vs. HANSESWARI THAKURANI & ORS.

63 Cal. 629=40 C.W.N. 271

Secs. 5 & 33—Notice under the section showing amount in arrear, part of which is really in arrear but part not—Subsequent sale if void Sec. 33, if applies to such sale—Proprietor appropriating proceeds of such sale, if may question sale in suit commenced before appropriation.

If the notice under Sec. 5 of the Bengal Land Revenue Sales Act be issued in respect of a sum which has not yet become an arrear along with other sums which have become arrears, and subsequently the estate is sold on the footing of being in arrears for the whole amount, the sale is nevertheless a sale under the Revenue Sale Law and is not void sale. To such a sale, Sec. 33 of the Act would apply; and if a proprietor by his own act applies a portion of the sale proceeds to the payment of a different debt, he debars himself from questioning the legality of the sale although such appropriation may be after the institution of the suit in which the sale is questioned. (*D. N. Mitter & Patterson JJ.*)

RAMPROSAD CHOWDHURI vs. RAM JADU LAHIRI & ORS.

40 C.W.N. 1054

Bengal Land Revenue Sales Act—(Contd.)

Sec. 6—Publication of sale notification in Official Gazette of must be before 30 days from sale—Effect of later publication.

The publication of the sale notification in the official Gazette which is required in certain cases by Sec. 6 of the Bengal Land Revenue Sales Act need not be before 30 days from the date of the sale. Assuming that an interval of 30 days is necessary, later publication is only an irregularity which will not invalidate the sale except on proof of substantial injury. (*Guha & Bartley, JJ.*)

RAM RANJAN MELLICK & ORS. vs. JAMINI SUNDARI DASSYA.

40 C.W.N. 1114=A.I.R. 1936 Cal. 415

Secs. 6 & 7—Mention of arrears of cess in sale-proclamation, if makes sale for arrears of revenue illegal.

Where in a sale for arrears of revenue, the amount due on account of cesses was mentioned in the sale-proclamation, but it was not amalgamated with or included in the revenue, the amount of revenue in arrear and the amount of cess due being separately mentioned, held, that under the circumstances, the mention of the amount of cesses due along with arrears of revenue in the sale notification, in pursuance of which the revenue sale was held, did not make the sale illegal under the law. (*Guha & Bartley, JJ.*)

RAM RANJAN MULLICK & ORS. JAMINI SUNDARI DASSYA.

40 C.W.N. 1114=A.I.R. 1936 Cal. 415

Sec. 14—Recorded co-sharer of includes defaulting co-sharer.

The expression "other recorded co-sharers in Sec. 14 of the Bengal Land Revenue Sales Act, means a recorded sharer of a share other than the share exposed for sale. (*Mukherji & S. K. Ghose JJ.*)

MANINDRA DEB RAI vs. HANSESWARI THAKURANI & ORS.

63 Cal. 629=40 C. W. N. 271

Sec. 31—Suit for recovery of surplus sale proceeds by actual proprietor against recorded proprietor if maintainable.

Bengal Land Revenue Sale Act—(Contd.)

Sec. 31, Bengal Land Revenue Sales Act merely directs payment by the revenue officer to a certain person, that person being the person whose name is entered as proprietor. There is nothing in the section which in any way governs the right of a person, who is in fact entitled to the surplus sale proceeds, recovering them from the person paid by the collector under the section. (*Wort & Rowland JJ.*)

BHAGAWATI SARAN SINGH vs. RAI KISHENJI.

15 Pat. 433 = A. I. R. 1936 Pat. 370 = 161 I. C. 171 = 17 Pat. L. T. 663

S-c. 31—Cause of action in a suit for surplus sale proceeds by actual proprietor.

A suit by the actual proprietor against the recorded proprietor for recovery of surplus sale proceeds paid to the latter by the revenue officer under Sec. 31, of the Bengal Land Revenue Sales Act is maintainable as a suit for money received by the recorded proprietor for the use of the person actually entitled to it. (*Wort & Rowland JJ.*)

BHAGAWATI SARAN SINGH vs. RAI KISHENJI.

15 Pat. 433 = A. I. R. 1936 Pat. 370 = 161 I. C. 171 = 17 Pat. L. T. 663

Sec. 31—Sale of property by recorded proprietor—subsequent revenue sale—right of purchaser from the recorded proprietor to recover from him the surplus sale proceeds paid to him by the Collector.

The surplus sale proceeds of a revenue sale of certain property having been over by the Collector to the defendant who was the recorded proprietor of the same under Sec. 31, of the Bengal Land Revenue Sales Act, the plaintiff sued to recover the amount with interest on the ground that he had purchased the property in question prior to the date on which the revenue sale was held. Held that in deciding the question of the maintainability of the plaintiff's claim, the real test was not the knowledge of the Collector, nor the question as to whether the defendant had rightfully received the money from the Collector, but to whom the

Bengal Land Revenue Sale Act.—(Contd.)

money rightfully belonged. The plaintiff was entitled to the surplus sale proceeds of the Revenue sale and interest thereon from the date when he first demanded the surplus sale proceeds. (*Wort & Rowland JJ.*)

BHAGAWATI SARAN SINGH vs. RAI KISHENJI.

15 Pat. 433 = 17 Pat. L. T. 663 = A. I. R. 1936 Pat. 370 = 161 I. C. 171

Secs. 31 & 60—Entry in registers of collectorate—effect of.

A mere entry of one's name in the registers of the collectorate does not either create or prove title in favour of such person. Although Sec. 31, Bengal Land Revenue Sales Act does not contain an express saying similar to that in Sec. 60 of the Act, it cannot be said that merely because of the absence of such a saying, and entry in the land registration register create ownership in the registered proprietor. (*Wort & Rowland JJ.*)

BHAGAWATI SARAN SINGH vs. RAI KISHENJI.

15 Pat. 433 = A. I. R. 1936 Pat. 370 = 161 I. C. 171 = 17 Pat. L. T. 663

Sec. 33—Suit for mere declaration of nullity of sale without prayer for setting aside same, if maintainable.

A suit for a mere declaration that a revenue sale was illegal, *ultra vires* and of no force and effect, with a prayer for consequential relief in the shape of setting aside the sale, is not maintainable under the Revenue Sale Law. (*Guho & Bartley JJ.*)

RAM HANJAN MULLICK & ORS. vs. JAMINI SUNDARI DASIA.

40 C. W. N. 1114 = A. I. R. 1936 Cal. 415

Sec. 33—Suit for setting aside revenue sale—ground not taken before Commissioner, if can be taken in the suit.

The wording of Sec. 33 of the Bengal Land Revenue Sale Act is very particular and as worded, that section requires that the ground on which a revenue sale is

Bengal Land Revenue Sale Act—(Contd.)

sought to be set aside should be declared and specified. Omission to take the ground in a definite form and with sufficient particularity before the Commissioner is a bar to the ground being put forward as a ground in a suit to set aside the sale. (*Mukherjee A. C. J. & S. K. Ghosh J.*)

MANINDRA NATH SEN vs. KHUDIRAM DAS & ORS.

A.I.R. 1936 Cal. 142 = 161 I.C. 735

Sec. 33—*Suit by reversioner that sale not being fraudulent was binding on him as reversioner, if barred by Sec. 33.*

A reversioner challenged a Revenue Sale on the ground that the limited owner had wilfully defaulted in the payment of Government Revenue, in consequence whereof the Towzi was put up to auction and purchased by her Goinasta. His statement in the plaint was to all intents and purposes, that the sale was a fraudulent collusive and *benami* transaction, and adversely affected his reversionary rights.

Held, that the fact that the suit was based on a definite allegation of fraud was in itself sufficient to entitle the plaintiff to relief, and the suit was not barred under Sec. 33 of the Bengal Land Revenue Sales Act. (*S. K. Ghosh & Edgely J.J.*)

ASHUTOSH SANJAL & ORS vs. RAM SUNDAR GHOSH & ORS.

A. I. R. 1936 Cal. 198 = 162 I.C. 695

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822)

Sec. 9—*Duty of settlement officer under the Regulation.*

Under the Bengal Land Revenue Settlement Regulation, a settlement officer has two distinct functions to perform, (i) to settle the land revenue, and (ii) to prepare the record-of-rights, generally known under the vernacular name of *Wajib-ul-arz*, recording matters specified in Sec. 9 of the Regulation. (*Sir John Wallis.*)

MAHESH PRASAD SINGH vs. BADRI LAL SAHU.

63 I. A. 207 = 63 Cal. 990 = 1936 A. L. J. 656 = 1936 A. W. R. 282 = 40 C.W.N. 900 = 63 C. L. J. 363 = 70 M. L. J. 633

Bengal Land revenue settlement—(Contd.)

1936 M. W. N. 593(1) = 43 M. L. W. 603 = 38 Bom. L.R. 484 = 1936 O.W. N. 313 = 161 I.C. 673 = A.I.R. 1936 P.C. 108

Sec. 9—*Decision of Board of Revenue—Weight to be attached.*

The decision of an officer of the Board of Revenue in settlement proceedings must be ascertained exclusively from the *Rubkars* and *Wajib-ul-arzes*, in which his decisions as settlement officer are recorded and not from what he or others afterwards said or wrote about them. Further, as those decisions become binding, at any rate, after confirmation, unless challenged in civil suit, they must be strictly construed and be expressed with sufficient clearness to bring home to the parties concerned that questions of title are being decided against them. (*Sir John Wallis.*)

MAHESH PRASAD SINGH vs. BADRI LAL SAHU.

63 I. A. 207 = 63 Cal. 990 = 1936 A.L.J. 656 = 1936 A.W.R. 282 = 40 C.W.N. 900 = 63 C.L.J. 363 = 70 M.L.J. 633 = 1936 M.W.N. 593(1) = 43 M.L.W. 603 = 38 Bom. L.R. = 1936 O.W.N 313 = 163 I.C. 673 = A.I.R 1936 P.C. 108

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885).

Sec. 9 (2)—*Son living with father at residence of latter, if qualified for election as member of District Board.*

A son living with his father at a residence belonging to the latter is not qualified for election as a member of the District Board, inasmuch as under Sec. 9 (2) of the Bengal Local Self-Government Act and r. 59 of the Election rules, among persons living within a Union, only electors to the Union Board are qualified for election as members of the District Board. (*Jack J.*)

KASIRUDDIN TALUKDAR vs. MAFI-ZUDDIN AHMED.

40 C.W.N. 753 = 165 I.C. 354 = A.I.R. 1936 Cal. 295

Sec. 138A—*Dispute as to qualifications for membership of District Board, if within exclusive jurisdiction of District Magistrate—Suit for declaration of consti-*

Bengal Local Self-Government (Contd.)

tution of District Board by reason of election of unqualified persons, if lies in Civil Court.

A dispute as to the qualifications of a person for membership of the District Board is a dispute under the Rules framed under the Bengal Local Self-Government Act and since under r. 56 read with r. 1 (a), such a dispute is to be dealt with by a District Magistrate whose decision is final, no suit lies in the Civil Court for a declaration that the constitution of a District Board is illegal by reason of election thereto of certain persons who are not qualified for elections. (*Jack J.*)

KASIRUDDIN TALUKDAR vs MAFI-ZUDDIN AHMED

40 C.W.N. 573=165 I.C. 354=A.I.R. 1936 Cal. 295

R. 67—*Illegal election of some members if invalidates whole election—Election of chairman and vice-chairman, if vitiated on such ground.*

Even if one of the elected members of a District Board be found not to be duly qualified, that does not invalidate the whole election, and when the invalid election of certain members has not in any way affected the election of the chairman and the vice-chairman, there is no foundation for a claim that the election of the latter should be declared invalid. (*Jack J.*)

KASIRUDDIN TALUKDAR vs. MAFI-ZUDDIN AHMED.

40 C.W.N. 753=165 I.C. 354=A.I.R. 1936 Cal. 265

BENGAL MONEY LENDER'S ACT (VII OF 1933)

Sec 3—*Applicability of the Section to suits, judgments in which passed before Act came into operation.*

Sec. 3 of the Bengal Money Lender's Act does not apply when a loan had been incurred and the decision of the trial Court had been given before the Bengal Money Lender's Act came into operation. (*R. C. Mitra J.*)

INDRA CHANDRA BAG vs, HIRALAL RONG.

40 C.W.N. 696=62 C.L.J. 543=A.I.R. 1936 Cal. 127

Bengal Money Lender's Act—(Contd.)

Sec. 3—*Scope of—presumption under the section, if can be rebutted by creditor.*

Under Sec. 3 of the Bengal Money-Lender's Act, a presumption arises when the rate of interest exceeds 25 per cent per annum in the case of unsecured loans that the transaction is harsh, unconscionable and substantially unfair—a presumption which may be rebutted by the creditor by leading evidence on the point. It is not the law that the Court cannot in any circumstances give a decree for interest at a rate exceeding 25 per cent per annum. (*R. C. Mitra J.*)

INDRA CH. BAG vs. HIRA LAL RONG.

40 C.W.N. 696=62 C.L.J. 543=A.I.R. 1936 Cal. 127

Secs 3 & 4—*Provisions of the section, if applies to cases in which appeal pending at the time Act came into force.*

Sec 3 of the Bengal Money-lenders' Act does not apply to a suit which had been disposed of by trial Court, and in respect of which an appeal was pending at the time the Act came into force. Neither does Sec. 4 apply in such case. (*D. N. Mitra & Patterson JJ.*)

RADHARANI DASI vs, KHETRAMOHAN CHAKRABORTY.

40 C.W.N. 409

BENGAL MUNICIPAL ACT (III OF 1894).

Sec. 30 (as amended by Act IV of 1894)—*Roads over which public have a right of way, if vest in Municipality.*

Roads over which the public have a right of way, if they are not private property, vest in the Municipality under Sec. 30 of the Bengal Municipal Act, 1894, as amended by Act IV of 1894. There may be roads over which the public have right of way, and yet the road *qua* road may still be private property; but such a road cannot be a road over which the public in general have a right of way although it be on private rent free land. (*Per Mukherjee Mitra & Patterson JJ.*)

Roads over which the public have a right of way in a Municipality vest in the Municipal Commissioners. Such roads can-

Bengal Municipal Act—(Contd.)

not be private property *qua* roads. (*Per Jack & S. K. Ghosh, JJ.*)

NIROD CHANDRA MUKHARJEE vs. CHAIRMAN KAMARHATI MUNICIPALITY.

40 C.W.N. 1070 = 63 A.L.J. 436 = A.I.R. 1936 Cal. 506 = 164 I.C. 500

Secs. 118, 120 & 121—Presentation of bill for tax and notice of demand—Application for review during pendency whereof bills for other quarters at original rate presented—Reduction of rate on review and single notice of demand for instalments due with copy bills at reduced rate Distress warrant within three months of such notice, if legal, when copy of bills presented beyond six month from date when tax become due—Tender of tax under protest, if conditional tender and if may be refused—Single notice of demand together with a copy of bill for several instalments of tax due—Tender of tax of one quarter illegally refused—Distress warrant in respect of instalments, if entirely invalidated—Single notice of demand for several instalments, if legal.

When during the pendency of an application for review, bills at the original rate for the municipal tax for other quarters are presented and on the rate being reduced on review, a notice of demand in respect of all the quarters due together with "copy bills" is served, such bills being made out at the reduced rate, the Municipality, on nonpayment of the bills within 15 days, acts within jurisdiction and within time in levying distress within three months from notice of demand although the copy bills may have been served more than six months after the tax for the respective quarters became due. But when on such a notice being served, the assessee, within the time prescribed, tenders the tax for one quarter under protest but with no other condition, the tender is valid and its refusal is illegal and apart from validity of single notice of demand for several quarters which is doubtful, such refusal invalidates the whole Warrant of Distress which may have been issued in respect of all the instalments of tax due including that which was tendered. (*Mukherjee & Jack JJ.*)

Bengal Municipal Act—(Contd.)

BHAWANI PROSANNA LAHIRI vs. THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS, RANGPUR MUNICIPALITY.

40 C.W.N. 977 = A.I.R. 1936 Cal. 542

BENGAL MUNICIPAL ACT (XV OF 1932).

Sec. 18 (1), cls (i) & (ii)—Provisions of the clausd, if must be read conjunctively or disjunctively Local Government, if has independent power under each clause—Number of appointed Commissioners increases under cl. 1 for proper representation of industries and labours Government if bound to direct preparation of special electorate role for non-industrial voters under cl. 2 or may direct election to be held from general electorates.

Clauses (i) & (ii) of Sec. 18 (1) of the Bengal Municipal Act are to be read not conjunctively, but disjunctively. The Local Government has independent option attaching to each clause so that upon taking action under the first, it is not bound to take action under the second. Accordingly even after the Govt. has taken action in the in the first of the two ways indicated in cl. (i) and increased the number of appointed commissioners for the proper representation of industries and labour, it is not bound to direct the preparation of a special electoral role for non industrial voters under cl. (ii) and may leave the elected commissioners to be returned from general electorates, composed of both industrial and non-industrial voters. (*Mukherjee A. C. J. & S. K. Ghosh, J.*)

APARNA PROSAD CHUNDER vs CHAIRMAN OF GARULIA MUNICIPALITY.

40 C.W.N. 533 = A.I.R. 1936 Cal. 123 = 161 I.C. 749 (2)

Sec. 23 (2) (iii)—Occupier of holding if required to carry on trade or profession for 12 months before the election.

The Occupier of a holding is not required under Sec. 23 (2) (iii) of the Bengal Municipal Act to carry on a trade or profession for a period of 12 months immediately preceeding the election within the limits of the Municipality. The provision for carrying on trade or profession is not

Bengal Municipal Act—(Contd.)

governed by the conditions as to the minimum period of 12 months. (*S. K. Ghosh J.*)

BIRENDRA LAL CHOUDHURY vs. NAGENDRA NATH MUKHERJEE,

62 C.L.J. 349 = 163 I.C. 573

Sec. 37—Dist. Judge hearing election petition if a persona designata.

The District Judge hearing an election petition under Sec. 37 of the Bengal Municipal Act is not a *persona designata* but the Court of the District Judge. (*R. C. Mitter J.*)

PHANI BHUSAN SEN vs. SANTI KUMAR MAITRA.

63 Cal. 487 = 40 C.W.N. 124 = 165 I.C. 537

Sec. 37—Exception taken to nomination paper during scrutiny—same objection, if can be taken in election petition.

A ground of objection taken at the time of the scrutiny of the nomination papers, if repelled, can be urged in an election petition under Sec. 37 of the Bengal Municipal Act. (*R. C. Mitter J.*)

PHANI BHUSAN SEN vs. SANAT KUMAR MAITRA.

63 Cal. 487 = 40 C.W.N. 124 = 165 I.C. 537

Sec. 37—Publication of result of election in Calcutta Gazette, if prevents proceedings for setting aside election to be taken or continued.

The publication of the names of persons elected as Municipal Commissioners in the Calcutta Gazette does not prevent proceedings for setting aside the election being taken or continued before the District Judge. (*R. C. Mitter J.*)

PHANI BHUSAN SEN vs. SANAT KUMAR MAITRA.

63 Cal. 487 = 40 C.W.N. 124 = 163 I.C. 537

Sec 37 & C. P. Code. Sec. 114 & Or. 47—Order passed by District Judge on election petition, if can be reviewed by him.

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Bengal Municipal Act—(Contd.)

An order passed by the District Judge on an election petition is not appealable. But the District Judge can review his own order passed on such an application on the grounds mentioned in Sec. 114 & Or. 47, C. P. Code. Such power of review is conferred on him by Rule 5 of the Statutory Rules made by the Local Govt. under the Act. (*R. C. Mitter J.*)

PHANI BHUSAN SEN vs. SANAT KUMAR MAITRA.

63 Cal. 487 = 40 C.W.N. 124 = 165 I.C. 537

Sec. 129 (b)—Question of "ownership" if may be decided by the Municipal Commissioner.

Sec 129, Bengal Municipal Act, leaves the decision of the matter of deciding "ownership" to the Commissioners themselves and not the court. Where, therefore, agricultural lands within a Municipality were held by occupancy raiyats who received no rent, on the contrary paid rent to the landlord, but the Municipal Commissioners decided that the owners of the occupancy right were to be considered as "owners" within the Municipality, held that the Commissioners were within their rights in so deciding, such right having been given to them absolutely under Sec. 129 (b), Bengal Municipal Act. (*M. C. Ghosh J.*)

DHARNIKAR PARAH & ORS. vs. CHAIRMAN OF COMMISSIONERS OF TAMLUK MUNICIPALITY.

A.I.R. 1936 Cal. 641

Sec. 535—Section, if applies to suit for injunction and damages in respect of nuisance caused by defective hackney carriage stands.

Sec. 535 of the Bengal Municipal Act does not apply to a suit for injunction and damages in respect of nuisance caused by defective hackney carriage stand, (*R. C. Mitter J.*)

NIRMAL CH. SANYAL & ANR. vs. MUNICIPAL COMMISSIONERS OF PABNA TOWN.

40 C.W.N. 1353 = A.I.R. 1936 Cal. 707

BENGAL PUTNI REGULATION.— (VIII OF 1819).

Sec. 13—*Sale of putni tenure by putnidar—transferee not registered in Zamindar Seristar—effect of.*

A Zamindar is not bound to recognise the transferee of a Putnidar under Sec. 13 of the Bengal Putni Regulation until certain conditions are fulfilled.

Until registration of the name of a purchaser of the Putni tenure is effected in a landlord's Seristar, the transfer does not affect the Zamindar's right, and in spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed upon the tenure. 54 Cal. 1064 followed. (*D. N. Mitter & Patterson JJ.*)

ADHAR CH. MONDAL vs. DOLGOBINDA DAS.

63 C.L.J. 287 = 40 C.W.N. 1037 = A.I.R. 1936 Cal. 663

Sec. 14—*Proceedings by which Patni sale may be challenged.*

A Patni sale can be challenged by no other proceedings than a suit under Sec. 14 of the Bengal Patni Regulation which must be a suit for setting aside the sale, brought in strict accordance with the procedure laid down in that section. A suit for a mere declaration that a patni sale is fraudulent, collusive and not enforceable against the putnidar is not maintainable. (*Jack & Edgley JJ.*)

MAHAMMED BADSHA MIA vs. KUMAR ARUN CH. SINHA.

40 C.W.N. 1233

Sec. 14A—*Sale, if may be set aside when deposit falls short of amount required but zamindar consents to sale being set aside.*

There is no scope for the application of the principle of waiver to the requisites for setting aside a sale under Sec. 14A of the Bengal Putni Regulation. Accordingly, even assuming that of the amounts required to be put in under Sec. 14A, deposit of a part with the Collector and the payment of the balance to the zamindar out of court, is sufficient compliance with the section, whether there is a shortage in the deposit

Bengal Putni Regulation—(Contd.)

and the amount of the shortage is not in fact paid to the zamindar the fact of the zamindar having no objection to the sale being set aside, cannot entitle the Court to set aside the sale. Also the fact of the Zamindar not opposing the setting aside of the sale does not constitute a waiver of dues. (*R. C. Mitter J.*)

NANDA KUMAR PANDE vs. SOURENDRA NATH GHOSE.

40 C.W.N. 792 = A.I.R. 1936 Cal. 129

Sec. 14A—*Application for setting aside sale—deposit inadequate—Zamindar, if can waive it by giving consent.*

By a sale of a patni under the Patni Regulation, the auction purchaser acquires very valuable rights. Therefore where the deposit setting aside the sale is found to be inadequate, the Court cannot set aside the sale on a mere statement by the zamindar that he has no objection to the sale being set aside. In such a case there can be no scope for the application of the principle of waiver. (*R. C. Mitter J.*)

NANDA KUMAR PANDE vs. SOURENDRA NATH GHOSH.

40 C.W.N. 792 = A.I.R. 1936 Cal. 129

BENGAL REVENUE FREE LANDS NON-SADSHAH GRANT REGULA- TION (XIX OF 1793).

Resumption proceedings—position of invalid lakhirajdars.

Sec. 4-6—[It is clear from the provisions of Secs. 4 to 6 of Regulation XIX of 1793 & Sec. 3 of Regulation II of 1819 that there was no intention in resumption proceedings to dispossess the holders of invalid lakhiraj, but rather to assess them to revenue where the land exceeded 100 bighas or to rent under the proprietors of the estate within whose boundaries they were included when the area was less than 100 bighas. (*Pearson & Jack JJ.*)]

JUGAL CHARAN MONDAL vs. RAI DEVENDRA NATH BALLAV BAHADUR.

63 C.L.J. 593

BENGAL SURVEY ACT (V OF 1875).

Sec. 40—*Decision of boundary disputes under the section—effect of.*

Bengal Survey Act—(Contd.)

When a dispute about the boundary between two mouzas is decided in favour of one party under Sec. 40, Bengal Survey Act, the decision operates as a civil court decree and stands good until it is set aside by a proper suit by the other party. Where no such suit is brought within twelve years from the date of decision, the title of the other party is extinguished, and the party in whose favour the decision under Sec. 40 was made, obtains an absolute title. (*M. C. Ghosh J.*)

HUMAYUN RAJA CHAUDHURY vs.
JYOTIRMOYEE DEBI.

A.I.R. 1936 Cal. 452

Sec. 41—Order determining boundary line dispute—Suit for confirmation of possession—Plaintiff contending that he has been in possession from before—Maintainability of the suit.

Sec. 62 of the Bengal Survey Act is a bar to a suit by a plaintiff against whom an order determining the boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having under Sec. 41 the effect of a civil court decree which is binding on the parties as regards the question of possession. It amounts to determination of boundary according to actual possession within the meaning of the section. (*Dhavl & Agarwalla JJ.*)

BHUPNARAIN SINGH vs. HIRALAL.

17 P.L.T. 405 = 161 I.C. 709 = A.I.R. 1936 Pat. 185

Sec. 41—Adoption of boundary line for record-of-rights of neighbouring Mouzas, if amounts to determination of boundary.

The adoption of a boundary line given in the Record-of-Rights of a neighbouring Mouza amounts to a determination of boundary according to actual possession within the meaning of Sec. 41 of the Bengal Survey Act. (*Dhavl & Agarwalla JJ.*)

BHUPNARAIN SINGH vs. HIRALAL.

A.I.R. 1936 Pat. 185 = 161 I.C. 709 = 17 P.L.T. 405

Bengal Survey Act—(Contd.)

Secs. 41 & 62—Order determining boundary line dispute—suit for confirmation of possession on allegation that plaintiff has been in possession from before order, if barred.

Sec. 62, Bengal Survey Act, is a bar to a suit by plaintiff against whom an order determining boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having under Sec. 41 of that Act, the effect of a civil court decree, which is binding on the parties, as regards the question of possession. (*Dhavl & Agarwalla JJ.*)

BHUPNARAIN SINGH vs. HIRALAL.

A.I.R. 1936 Pat. 185 = 161 I.C. 709 = 17 P.L.T. 405

Sec. 62—Entry in Record-of-Rights relating to boundary between mouzas—Section applicable.

An entry in the Record-of-Rights relating to the boundary between two Mouzas unlike many other entries is governed by Sec. 62 of the Bengal Survey Act. 14 C. W. N. 356 followed. (*Dhavl & Agarwalla JJ.*)

BHUPNARAIN SINGH vs. HIRALAL.

A.I.R. 1936 Pat. 185 = 161 I.C. 709 = 17 P.L.T. 405

BENGAL TENANCY ACT (VIII OF 1885)

Sec. 2(5)—“Holding”—definition of the term as amended by Act IV of 1928, if retrospective in operation with deference to Sec. 30(5)—Tenancy existing prior to amendment consisting of some whole parcels and undivided shares of certain other parcels of land, if liable to enhancement of rent under Sec. 30 (b).

The amendment of the definition “holding” in 1928, has no retrospective effect so as to make a pre existing tenancy consisting partly of some entire parcels of land and partly of undivided shares in certain other parcels, liable to enhancement of rent under Sec. 30(b) of the B. T. Act, such enhancement not being available under the

Bengal Tenancy Act—(Contd.)

law as it stood before the amendment, *Guho & Bartley JJ.*)

SRIPOTI CHANDRA DEY vs. KAILASH CHANDRA JANA.

40 C.W.N. 984 = A.I.R. 1936 Cal. 331

Sec. 7—Permanent lease by Shebait without legal necessity—Rent, liable to be enhanced.

The power of a Shebait of an idol to make an alienation is a limited power. Ordinarily a Shebait cannot grant a permanent lease at a fixed rent, but he may do so in case of unavoidable necessity. Where, therefore, a permanent lease has been granted by the Shebait of an idol without justifying necessity like the preservation of the property, the rent under the tenure is liable to enhancement under Sec. 7, B. T. Act. The Court can, in such a case, consider the question as to what should be the fair and equitable rent (*M. C. Ghosh. J.*)

HRISHIKESH ROY vs. UPENDRA NATH MONDAL.

A.I.R. 1936 Cal. 432

Sec 12—Ekrarnama by tenant relinquishing interest in favour of another—no valuable consideration—validity of the Ekrarnama.

An *ekrarnama* recited that the executant thereof without any compulsion or duress disclaimed and relinquished his own *mokarari* title in respect of his share in the tenure, in favour of another, and that the latter was from that date the owner of the entire *mokarari* tenure. No valuable consideration was mentioned in the deed. *Held* that the deed could be construed as a deed of gift, and the transferee was liable for the rent of the tenure, even though the landlord's fee required to be paid under Sec. 12 of the Act was not paid. (*Fazl Ali & Luby JJ.*)

AJODHYA PRASAD SINGH vs. AMIN-UDDIN AHMED,

17 P.L.T. 150 = 159 I.C. 722 = A.I.R. 1935 Pat. 481

Bengal Tenancy Act—(Contd.)

Sec. 18 (2) & 3—Provisions of Sec. 23, if affected by Sec. 18(2).

Sec. 23, B. T. Act, has no application to tenants holding at a fixed rate of rent, and the amended Act has made no alteration in this respect. Cl. (2) of Sec. 18 has no application to Sec. 23. (*Jack J.*)

SHIB CHANDRA SARKAR vs. PANCHANAN KOLEY.

64 C.L.J. 71

Sec. 22—Purchase of holding by co-sharer landlord—consent of other co-sharers obtained.

A purchase by the co-sharer landlord of a holding, of one of the tenant's interest with the consent of the other co-sharers would place the purchaser co-sharer landlord in the position provided for by Sec. 22, B. T. Act. (*Wort J.*)

NAGA RAI vs. BUCHI RAI.

A.I.R. 1936 Pat. 265 = 162 I.C. 875

Sec. 22(2)—Joint holding—co-sharer landlord purchasing *raiya* lands—such land allotted to him on partition—rights of co-proprietors.

Under Sec. 22 cl. (2), Bengal Tenancy Act, a co-sharer purchasing land in rent execution is entitled, even after he has ceased to be a co-proprietor by reason of a partition, to hold the *raiya* lands purchased by him subject to the payment of rent as provided in Sec. 22(2) of the Act. What is really available for partition in such circumstances is not the land itself, but the rent that would have been paid for the land by the occupancy *raiya*s whose place is taken by the purchasing co-proprietor with the result that he becomes liable until partition to pay a proportionate share of the rent to the co-proprietor or co-proprietors. These rents would be taken into account in the partition, but not the land purchased by the co-proprietor. 6 P. L. T. 750 & 7 P. L. T. 87 discussed; 7 P. L. T. 170, 2 P. L. T. 163 & 3 P. L. T. 13 followed. (*Courtney Terrell C. J. & Dwyer J.*)

DHANESHWAR KUER vs. CHANDRA DHARI SINGH.

17 P.L.T. 97 = A.I.R. 1936 Pat. 317 = 162 I.C. 820

Bengal Tenancy Act—(Contd.)

Sec. 23—*Sec. 23, if applicable where there is no evidence of breach of contract.*

Sec. 23, B. T. Act, has no application to a case in which there is no evidence that there has been any breach of a contract between the landlord and the tenant under the terms of which the latter is liable to be ejected. (*Jack, J.*)

SHIB CHANDRA SARKAR vs. PANCHANAN KOLEY.

64 C.L.J. 71

Secs. 23 & 87—*Transfer of non-transferable holding together with a sub-lease back from a transferee, if amounts to a transfer of whole interest in holding entitling landlord to re-enter.*

When a non-transferable occupancy ryot holding is transferred on the footing that an under-lease will be given to the transferor, the transaction is to be treated as a transfer of a part of the interest in the holding, and the landlord is not entitled to re-enter in the absence of abandonment within the meaning of Section 87 of the B. T. Act or repudiation of the tenancy. 36 C. W. N., 478 followed. (*Nasim Ali J.*)

SASTHI CHARAN BANIK vs. MANINDRA LAL SINGH.

40 C.W.N. 158=162 I.C. 250=A.I.R. 1936 Cal. 168

Sec. 26C—*Transfer fee—Landlord who has caused holding to be sold in execution of rent decree, if entitled to recover transfer-fee from prior transferee from tenant.*

A landlord who has caused an occupancy holding to be sold in execution of a rent decree, is not, for that reason debarred from recovering transfer fee from a prior transferee from the tenant, such fee not being a price of recognition under the New Bengal Tenancy Act, (*R. C. Mitter, J.*)

SHARFUDDIN AHMED vs. MAHARAJA JAGADISH NATH RAY.

63 Cal. 907=40 C.W.N. 502=63 C.L.J. 255=165 I.C. 426=A.I.R. 1936 Cal. 304

Bengal Tenancy Act—(Contd.)

Sec. 26C—*Transfer of occupancy holding, if complete against the landlord on receipt of notice of transfer or on registration of conveyance.*

The title in an occupancy holding passes from a transferor to the transferee as soon as the conveyance is registered, with effect from the date of conveyance, and the transfer is complete even against the landlord, terminating his relationship with the transferor, although he may not receive the notice of transfer and his fees till a subsequent date. (*R. C. Mitter, J.*)

MAHARAJA BAHADUR SINGH vs. NARI MOLLANI.

63 Cal. 1117=40 C.W.N. 683=A.I.R. 1936 Cal. 279=165 I.C. 17

Secs. 26 C & 26 E—*Co-sharer landlords left out in application for pre-emption, if must be added within 2 months of service of notice under Sec. 26 C or 26 E, on co-sharer applying for pre-emption.*

It is not required that co-sharer landlords who were left out in the application for pre-emption must be added within two months of the date of the service of the notice under Secs. 26 C or 26 E on the co-sharer landlord who had filed an application for pre-emption. (*R. C. Mitter J.*)

GAJENDRA NATH MONDAL vs. KUNJA BEHARI MISTRI & ORS.

40 C.W.N. 508=A.I.R. 1936 Cal. 388

Secs. 26C & 26 J—*Landlord's fee by whom to be paid—Liability to pay such fee, if dependent on transfer passing title—Purchaser from tenant during attachment in execution of rent decree, if liable to pay landlord's fee when holding sold in execution.*

Under Sec. 26 C read with Sec. 26 J(1), it is the purchaser who has to pay the transfer fee and his liability arises as soon as, on the transfer being accepted, the instrument is presented for registration, irrespective of whether the transfer passes title or not. Consequently, a transferee who purchases an occupancy holding from the tenant during the subsistence of an attachment in execution of a rent decree, is liable all the same to pay transfer fee,

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although the purchase passes no title to him against the landlord. (*R. C. Mitter J.*)

SHARFUDDIN AHMED vs. MAHARAJA JAGADISH NATE RAY & ANR.

63 Cal. 900 = 40 C.W.N. 502 = 165 I.C. 426 = 63 C.L.J. 255 = A.I.R. 1936 Cal. 304

Secs. 26 F (1) & 3—Time for depositing landlord's fee—failure to deposit the same within the time fixed—effect of.

Under Sec. 26 (a) (3), the Court must fix the time within which the landlord's transfer fee should be deposited by the auction-purchaser. If within that time the fee is not paid the Court must first make an order for forfeiture of the purchase money even though the auction-purchaser be the decree-holder himself, unless it decides for reasons to be given not to make such an order. Only thereafter the Court can direct the resale if the decree-holder so desires, such resale to be not in fresh execution proceedings but in the same proceedings under Sec. 26 (a) (3). (*Guho & Lodge JJ.*)

DURGA CH. DAS & ANR vs CHAIRMAN OF THE LABANGA SAMAAAYA SAMITY.

40 C.W.N. 143 = 162 I.C. 135 = 62 C.L.J. 372 = A.I.R. 1936 Cal. 171

Sec. 26 F—Right of co-sharer landlords to maintain independent applications under the section.

Co-sharer landlords have independent right to make independent applications under Sec. 26F, Sub-Sec. (1) of the B.T. Act. They are not bound to exercise their rights under that section only by becoming co-applicants in applications filed by their co-sharers. (*R. C. Mitter J.*)

MUKTI DEBI vs MANORAMA DEBI.

40 C.W.N. 1211 = 63 C.L.J. 566 = A.I.R. 1936 Cal. 490

Sec. 26F—Right of co-sharer landlord to withdraw his application for pre-emption where other co-sharers have joined in that application.

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When a co-sharer landlord has filed an application under Sec. 26F, B.T. Act, and some other co-sharers have joined in that application as co-applicants, the original applicant cannot withdraw his application without the consent of his co-applicants. (*R. C. Mitter J.*)

MUKTI DEVI vs. MANORAMA DEVI,

40 C.W.N. 1211 = 63 C.L.J. 566 = A.I.R. 1936 Cal. 490

Sec. 26F—Original applicant for pre-emption becoming co-applicants in application by another co-sharer—latter application dismissed for defect of parties—former application, if maintainable by original applicant along with co-applicants.

When an original applicant for pre-emption becomes a co-applicant in another application for pre-emption filed by some other co-sharer landlords but that application is dismissed for defect of parties, he can still maintain his own application along with his co-applicants. (*R. C. Mitter J.*)

MUKTI DEBI vs MANORAMA DEBI.

40 C.W.N. 1211 = 63 C.L.J. 566 = A.I.R. 1936 Cal. 490

Sec. 26F—Benamdar made a party in application under the section—Right of real owners to be added as party.

Where the benamdar of the real co-sharer landlord is made a party to an application under Sec. 26F at the time of filing such application, the real co-sharer can be added as co-applicants in such application. (*R. C. Mitter J.*)

MUKTI DEVI vs. MANORAMA DEVI.

40 C.W.N. 1211 = 63 C.L.J. 566 = A.I.R. 1936 Cal. 490

Sec. 26F—Application for pre-emption and deposit of money—application dismissed for default—money deposited fraudulently withdrawn by a decree-holder against landlords—application for pre-emption restored—applicant, if can be directed to make fresh deposit.

An application for pre-emption under Sec. 26F, B.T. Act, together with the necessary deposit was made by a co-sharer

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landlord. That application was dismissed for default. Thereafter a decree-holder against the applicant fraudulently and collusively attached the money deposited in Court and withdrew the same in execution of his decree. Later, the applicant for pre-emption obtained an order for restoration of his application for pre-emption which had been dismissed for default, and on his petition the executing Court directed the decree-holder who had fraudulently withdrawn the money deposited in Court to refund the same. On his failing to do so within the time granted, the Court hearing the application for pre-emption which was provided over by the same officer as the executing Court directed the applicant for pre-emption to make a fresh deposit of money required by Sec. 26F B. T. Act, and on his failure to do so, dismissed the application for pre-emption.

Held, that Sec. 26F. B. T. Act, contemplated two distinct orders. *first*, an order for pre-emption if the applicants are entitled to it, and *second*, an order for payment of certain money to the purchasers to which he may be entitled, although the second order is dependant on the first. The money required to be deposited by Sec. 26F. B. T. Act, having been deposited when the application for pre-emption was originally filed, the requirements of the statute were satisfied and the application for pre-emption could not be dismissed as defective but ought to have been considered on the merits. (*R. C. Mitter J.*)

RAKHAL DAS SOM vs. SARALA BALA HALDAR & ORS.

40 C.W.N. 1182=62 C.L.J. 119

Sec. 26F - Applicants under Sec. 26F co-sharer landlords of three holdings—under Estate Partition Act two holdings and part of the third given to one, remaining part of that third to the two others suit for rent for those two holdings purchased in execution—whether the other co-sharer entitled to pre-emption.

The applicant and the two opposite parties were co-sharer landlords in respect of three holdings. Under the Estate partition Act, two of those holdings were allotted

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exclusively to the allotment of the petitioner, and partly to the opposite parties. The opposite parties instituted suit for rent for these three holdings for a period anterior to the partition, obtained decrees, and in execution thereof purchased the holdings. The applicant applied for pre-emption. *Held*, that the application could not be resisted. (*R. C. Mitter J.*)

RAM SASHI GHOSH vs. MAHENDRA NATH SINGHA.

A.I.R. 1936 Cal. 223=162 I.C. 564

Sec. 26(F) (1) & (4)—Deposit if must necessarily accompany application—time for making deposit if may be extended.

Whether application for pre-emption be an original application under Sec. 26F (1), B. T. Act or an application to be joined as a co-applicant under Sec. 26F (4) of the Act, the deposit to be made, although it need not necessarily be made along with the application, must be made within the time limits imposed by the statute for making the application. In neither case can the Court extend the time, but if in the latter case, service of notice of the application under Sec. 26 F (1) be delayed by the applicant, his application will be thrown out, whereas if he delayed beyond one month by reason of the fault of the Court or its officers, the Court will be bound to relieve the other co-sharers against the prejudice caused. (*R. C. Mitter J.*)

SACHINDRA NATH CHAKRAVARTI vs. TRAILOKHA NATH CHAKRAVARTI & ANR.

40 C.W.N. 1023=A.I.R. 1936 Cal. 576

Secs. 26F(1) (5) (6) & (8)—Application for pre-emption by landlord on occupancy tenant selling his share—Suit for pre-emption by another co-sharer by inheritance decreed—Application for pre-emption, if liable to be dismissed.

An application for pre-emption under Sec. 26F, B.T. Act was filed by a landlord in respect of certain shares in an occupancy holding sold by the tenant. Pending the disposal of the application, another co-

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sharer of the transferors who had become a co-sharer by inheritance under Mahomedan Law, filed a suit for pre-emption to enforce the right under the Mahomedan Law, and obtained a decree. *Held*, that the landlord's application for pre-emption was liable to be dismissed as there was no right, title or interest left in the vendees, and as there could be no order for pre-emption against the co-sharer who had obtained the decree by reason of Sec. 26F (1). (*R. C. Mitter J.*)

NALINAKSHA DUTT vs KAZI ABDUL JALIL.

A.I.R. 1936 Cal. 398

Sec. 26 F (1) & 4(a) —Defective application under Sec. 26F (1) & if justifies extension of time under Sub-Sec. 4(a).

If the application under Sec. 26F (1), B. T. Act, does not comply with Sec. 188, and is not put in order within limitation, the Court cannot for that reason extend the time for the deposit by a co-applicant Sub-Sec. 4 (b) beyond the periods of time laid down in Sub-Sec. 4(a). (*R. C. Mitter J.*)

SACHINDRA NATH CHAKRAVARTI vs. TRAILOKHIA NATH CHAKRAVARTI & ANR.

40 C.W.N. 1023 = A.I.R. 1938 Cal. 576

Sec. 26 F (1) & 4 a) —Time under the section if runs from service of notice of application.

The one month allowed under the second alternative in Sec. 26F (1) (a) of the B. T. Act is to be calculated from the date of the application under 26 F (1) and not from the date of the service of the notice thereof. (*R. C. Mitter J.*)

SACHINDRA NATH CHAKRAVARTY vs. TRAILOKHIA NATH CHAKRAVARTY & ANR.

40 C.W.N. 1023 = A.I.R. 1938 Cal. 576

Sec. 26F(1) & 26F.4) (a) —Co-sharer landlord not served with notice of transfer applying to become co-applicant in another co sharer's application to pre-empt — such application, if to be treated as application under Sec. 26F.1)—Other co-sharers, if entitled to make application to be made co-applicants within a month of second

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application, although they they did not apply on the first co-sharer's application and although beyond a month of that application.

If a co-sharer landlord, B, was not served with the notice of transfer, his application to become a co-applicant in the application for pre-emption made by another co-sharer landlord, A, who had been served with such a notice, is to be considered as an application for pre-emption under Sub-sec. (1) of Sec. 26F; and as soon as such an application is made, the remaining co-sharer landlords, C. & D, would have right to become co-applicants, if they make an application for being made so within one month of B's application for pre-emption, although they ask for pre-emption beyond a month of A's application and beyond two months of the service of notice of transfer on themselves. (*R. C. Mitter J*)

GADHADHAR SARKHEL vs. GOPAL CH. DAS.

63 Cal. 1079 = 40 C.W.N. 680 = A.I.R. 1936 Cal. 343

Sec: 26F (1) & (4) (a) —Notice of application to pre-empt not served on other co sharers in due time through Court's fault —Court, if has inherent power to relieve such co-sharers against time limit for application to be co-applicants.

When by reason of default or mistake of the Court, notice of an application for pre-emption by a co sharer landlord has been served on another co-sharer within a month, the Court has inherent power to relieve the latter against the time limit for making an application for being made a co-applicant. (*R. C Mitter J.*)

MAHARAJ RAHADUR SINGH vs, NARI MOLLANI.

40 C.W.N. 683 = A.I.R. 1936 Cal. 279
63 Cal. 1117 = 165 I.C. 17

Sec. 26 F (4) (a) —Court, if may extend time for making deposit.

The Court has no power to extend the time for making the deposit by a co-applicant beyond the period of time

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mentioned in Sec. 26 F (1) (a). (*R. C. Mitter J.*)

SACHINDRA NATH CHAKRAVARTY vs. TRILOKHYA NATH CHAKRAVARTY & ORS.
40 C.W.N. 1023 = A.I.R. 1936 Cal. 576

Secs. 26F & 188—*No guardian ad-litem appointed of minor opposite party in application under the section and order for pre-emption passed—application, if bad as hit by Sec. 188—proper procedure in such cases,*

Where there is a minor opposite party in an application under Sec. 26F, B. T. Act, but no guardian-ad-litem is appointed and an order for pre-emption is made, the application itself is not bad as being hit by Sec. 188 of the Act, but the proceedings and the order passed subsequent to the filing of the application are irregular. And the proper procedure is to set aside the order and remit the case in order that the proceedings may be continued after appointing a proper guardian, of the minor. In remitting such a case, where the time allowed for becoming a co-applicant has expired, the Court can direct the application to be entertained, where it is made by the guardian appointed, promptly, i.e., as soon as he has assumed his office as guardian of the minor. (*R. C. Mitter J.*)

MUKTI DEVI vs. MONOROMA DEVI.

40 C.W.N. 121 = 63 C.L.J. 566 = A.I.R. 1936 Cal 490

Secs. 26F & 188—*Application for pre-emption by one co-sharer landlord, when maintainable.*

Sec. 188, B. T. Act governs Sec. 26F of the Act and contemplates that an application for pre-emption under Sec. 26F (1) shall ordinarily be made by the whole body of co-sharer landlords acting together. One or more co-sharers, not being the whole body of co-sharer landlords, may however make an application under Sec. 26F(1), provided that two conditions are fulfilled, viz. (1) that all the other co-sharer landlords are made parties defendants to the proceedings; and (2) that all the other

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co-sharer landlords are given an opportunity of joining in the proceedings as co-applicants. If these conditions are not fulfilled, such co-sharers are not entitled to pre-empt under Sec. 26F. (*Lodge J.*)

MAHAMMAD GARIB HOSSAIN MIYA vs. HALIMANESSA BIBI.

63 Cal. 102 = 162 I.C. 255 = A.I.R. 1936 Cal. 231

Secs. 26F, 4(a) & 4(b) & Sec. 188—*Application for pre-emption by some co-sharer landlords—Further application to add some co-sharers as parties—Limitation.*

Where some only of the co-sharer landlords apply for pre-emption, an application by them to add some co-sharers as parties is barred unless made within the two limits of time mentioned in Sec. 26F, 4(a) that is two months of the service of notice under Sec. 27C or 26E on the co-sharers sought to be added (if there was service), or one month of the application for pre-emption, whichever is later. (*R. C. Mitter, J.*)

GAJENDRA NATH MANDAL vs. KUNJA-BEHARI MISTRI.

40 C.W.N. 506 = A.I.R. 1936 Cal. 388

Sec. 26J—*Section if constitutes a bar to a suit for landlord's fee—Proper procedure when suit filed.*

Sec. 26J of the Bengal Tenancy Act does not bar a suit for recovery of proper landlord's fees in a case coming under the section. The proper procedure when a suit is filed is, however, to treat it as an application under Sec. 26J. (*Jack J.*)

ANANDA PROSAD GHOSE vs. RANENDRA LAL CHOWDHURY.

40 C.W.N. 856 = 162 I.C. 715 = A.I.R. 1936 Cal. 342

Sec. 26J—*Proper compensation under the section.*

The proper compensation to be awarded to the landlord under Sub Sec. (2) of Sec. 26J must, subject to the statutory maximum depend on the circumstances of each case and it may in a case be a nominal one as where the statement as to the character of

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the tenancy in the instrument of transfer is supported by some judicial opinion. (*R. C. Mitter J.*)

SHEIKH ARJEDALI vs. SM. SORBASONA DASSI.

40 C.W.N. 1279

Sec. 26J—Transfer, if must be transfer in fact.

In order to attract the provision of Sec. 26J, B. T. Act, there must be a transfer in fact, that is offer and acceptance. (*R. C. Mitter J.*)

SARFUDDIN AHMED vs. MAHARAJ JAGADISH NATH RAY.

40 C.W.N. 502 = 62 Cal 900 = 165 I.C.
426 = 63 C.L.J. 355 = A.I.R. 1936 Cal.
503

Sec. 26 J—Suit for recovery of landlord's fees, if barred.

The provisions of Sec. 26J of the B. T. Act do not bar a suit by a landlord for recovery of landlord's fees. Where such a suit is filed, the proper course for the Court to adopt is to treat the matter as an application under Sec. 26J. 37 C. W. N. 917, 36 C. W. N. 847, distinguished. (*Jack J.*)

ANANDA PROSAD GHOSE vs. RANEN-LAL CHOUDHURI.

40 C.W.N. 856 = A.I.R. 1936 Cal. 342 = 165 I.C. 715

Secs. 26J & 111—Application under Sec. 26J, if one for determining status of tenant—Court's power to stay application under Sec. 111 in such a case.

A suit or proceeding can be stayed under Sec. 111 B. T. Act, only if the suit or the application is filed for the determination of the status of any tenant. The prayer in an application under Sec. 26J is not for the determination of the status of a tenant but for the recovery of a sum of money, although the question of status may have to be gone into. Accordingly, the Court can have no power to stay the application, under Sec. 111. (*R. C. Mitter J.*)

MAHARAJ BAHADUR SINGH vs. BENODE BEHARI CHOUDHURI.

63 C.L.J. 153 = A.I.R. 1936 Cal. 263 = 162 I.C. 814

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Secs. 26J & 158(c)—Application by landlord and order for payment of certain sum as transfer fee—Revision if lies against order and to what extent.

When an order for the payment of a certain sum of money as transfer fee is made on an application made jointly under Secs. 26J & 158(c) of the B. T. Act, an application for revision lies against such order subject to the condition that the finding as to the character of the tenancy cannot be questioned. (*R. C. Mitter J.*)

SHARFUDDIN AHMAD vs. MAHARAJA JAGADISH NATH RAI.

40 C.W.N. 502 = 63 Cal. 900 = 165 I.C.
426 = 63 C.L.J. 355 = A.I.R. 1936 Cal.
304

Secs. 26(N) & 26(O)—As introduced by Bihar Tenancy Amendment Act, 1934—provisions of the sections, if retrospective in operation so as to affect transfers in question in pending suits.

Secs. 26(N) & 26(O), Bengal Tenancy Act introduced by the Bihar Tenancy Amendment Act, 1934, applies to all transfers of occupancy holdings such as are particularized therein, including those which were in question in a pending suit at the date when the Amendment Act came into force. (*Sir George Rankin*)

K. C. MUKHERJEE vs. MST. RAM-RATAN KUAR & ORS.

40 C.W.N. 263 = 62 C.L.J. 419 = 70 M.
L.J. 105 = 17 P.L.T. 25 = A.I.R. 1936
P.C. 49

Secs. 29 & 52 (1) (a)—Jamabundi signed by tenant showing increase of rent for increase of area—suit for rent at figure of such jamabandi on ground of increase of area—defence under Sec. 29, B. T. Act—jamabandi showing calculation of rent at settlement by basic rates for different classes of land and also payment by tenant at increased rate—proof required from tenant and from landlord.

A jamabandi signed by the tenant showed an increase of rent in respect of the increased area of an agricultural tenancy created by an oral lease. In a suit by the landlord claiming rent at the figure men-

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tioned in such a *jamabandi* on the ground of increase of area, the *jamabandi* together with a previous *jamabandi* on which it was based and other circumstances showed that at the time of the settlement, the rent was calculated by reference to certain basic rates for different classes of land and also that the land was carefully measured. It further appeared that the tenant had paid at the increased rate for some years. *Held*, that the burden lay on the tenant, if he resisted the landlord's claim by invoking Sec. 29 of the B. T. Act to prove that the jama was held at a consolidated rent within specified boundaries; and if he fails therein it is still for the landlord to show that the area has actually increased since the settlement. (*Edgley J.*)

RADHARAMAN CHOWDHURI vs. PURNA CHANDRA MITTRA.

40 C.W.N. 1330

Sec. 30 (as amended by Act IV of 1928)—Tenancy created before amendment—Right of landlord to sue for enhancement of rent.

In the case of a tenancy consisting entirely of undivided shares of parcels of lands or partly of entire parcels of lands and partly of undivided shares in parcels of lands, Sec. 30, B. T. Act cannot be combined with the definition of "holding" as it obtains in the amended Act of 1928, so as to give the landlord the right to sue for enhancement of rent in respect of the tenancy created before the Amending Act IV of 1928 came into force. The amending Act cannot be given retrospective effect. (*Guha & Bartley JJ.*)

SRIPATI CH. DEY & ORS. vs. KAILAS CH. JANA.

40 C.W.N. 948 = A.I.R. 1936 Cal. 333

Secs. 30 (a) & 31 (a) —"Prevailing rate" meaning of.

The word 'prevailing rate' used in Sec. 30 (a) of the B. T. Act has a definite meaning. It is not average rent. If a decided majority of tenants of the locality pay one particular rate, that rate is to be taken as the prevailing rate of the locality. It is not

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necessary that the said majority must be paying absolutely the same rate; infinitesimal variations are disregarded. In localities where there is not even this amount of uniformity but a standard has according to the opinion of the local Government been set up, the legislature has by section 31A given an artificial definition of the words 'prevailing rate', and the said definition cannot be legitimately invoked in places where the said section has not been extended by notification by the local Government. (*R. C. Mitter J.*)

SAROJ KUMAR BOSE vs. ALEK SREIK.

62 C.L.J. 342

Sec. 38—Suit for rent by landlord—Tenant, if entitled to raise plea for abatement of rent.

The principle of Sec. 38, B. T. Act, applies not only to suits instituted by a tenant for abatement of rent, but also to a plea for abatement of rent taken by a tenant in a suit for rent by the landlord in which the tenant is a defendant. The tenant is entitled to raise such a plea and what he has to show in order to be successful is permanent deterioration leading to failure of outturn. 14 P. L. T. 368 followed. (*Rowland, J.*)

LAL BEHARI SINGH vs. MAHABIR MAHTON.

A.I.R. 1936 Pat. 414 = 163 I.C. 525

Sec 38 (1) (a)—Nature of deterioration contemplated by the section.

The word "permanent" in Sec. 38 (1) (a) B. T. Act, must be read with reference to the circumstances of the case. The deterioration referred to in the section must be such deterioration as would continue to effect from year to year unless and until something is done to remedy it. The fact that it can be remedied by expenditure of capital and labour will not prevent its being recorded for the purpose of Sec. 38 and similar provisions of law as a permanent deterioration. (*Rowland, J.*)

LAL BEHARI SINGH vs. MAHABIR MAHTON & ORS.

A.I.R. 1936 Pat. 415 = 163 I.C. 522

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Sec. 48—Provisions of the new Section if retrospective in operation so as to entitle landlord of under-ryot to recover rent at contractual rate for period prior to commencement of amended law.

For a period prior to the coming into force of the new section 48 of the B. T. Act, the landlord of an under-ryot is not entitled to recover rent at a rate in excess of what was permitted by the old Sec. 48, although the suit may be brought after the new section has come into force, (*Nasim Ali & Henderson JJ.*)

AHMED AKANDA & ANR. vs. BAHARUDDIN SHAH & ANR.

40 C.W.N. 569 = 64 C.L.J. 1

Secs. 48 C & 178(d)—Ejectment of under-raiyat on expiry of lease—lease executed before B. T. Amendment Act of 1928.

Under the second proviso, cl. (i), (2) to Sec. 48 C of the B. T. Act, an under raiyat is protected from ejectment if he has been in possession of the land for more than twelve years; this is so even though his possession as under raiyat may not have extended over the whole period; or (read with Sec. 178b) the lease under which he holds might have been executed before the B. T. Amendment Act of 1928 inserting the new Sec. 48 C, came into operation. (*Jack J.*) •

BISWAMBAR CHAKRAVARTI & ORS. vs. KALIBAS DHUPLI.

40 C.W.N. 1275

Sec. 48D—Decree under the section irregularly passed—executing court, if may refuse to execute it.

When a decree for ejectment under Sec. 48D, B. T. Act, is put into execution, the executing Court cannot go behind the decree and refuse to execute the same on the ground that it had been irregularly made, viz., without first passing a preliminary order as required by sub-Sec. (3) of the section. (*R. C. Mitter J.*) •

SUBAL CH. JANA vs. SURENDRA NATH BERA & ORS.

40 C.W.N. 1293

Bengal Tenancy Act—(Contd.)

Sec. 50—Tenant when entitled to presumption under the section.

In a suit for ejectment by the landlord, the defendant pleaded their status as ryots holding at fixed rate, but failed to prove uniform payment of rent within 20 years preceding the institution of the suit. The difference in rent was due however to abatement on account of diminution of area by acquisition under the Land Acquisition Act, and not due to any variation in the rent or rate of rent. Held, that the tenant was entitled to the benefit of the presumption under Sec. 50, B. T. Act. (*Nasim Ali J.*)

RAJ NANDINI DEBI vs. BHUSAN CHANDRA SAR.

A.I.R. 1936 Cal. 234 = 162 I.C. 694(1)

Sec. 50(2)—Tenant, if can have a fixed rate tenancy combined with an area, the rent of which may be enhanced.

The presumption under Sec. 50 (2), B. T. Act, can not prevail in a case where it is admitted that the area of the holding includes a portion which had been commuted to *Nakdi* at some time previous to the last twenty years but since the permanent settlement, and the tenant can not identify the plots for which the *Sharahmun-yan* status was claimed on the basis of payment of a fixed rate of rent for the entire holding. But this would not imply that a tenant may not have a fixed rate tenancy combined with an area the rent of which may not be enhanced from time to time in accordance, with law, (*Dhawe J.*)

KAMESHWAR SINGH & ORS. vs. HEM NATH JHA & ORS.

17 P.L.T. 747

Sec. 50(2)—Presumption under the section, if rebutted by only substantial variation.

The presumption of fixity of rent arising under Sec. 50 (2) of the B. T. Act, is rebutted by proof of a real variation, however small it may be. The amount of the variation is an element in determining its reality, but a substantial variation is not, in itself, essential, (*R. C. Mitter J.*)

ARJAD ALI vs. SM. SCRASONA DASSI.

40 C.W.N. 1279 = 64 C.L.J. 51

Bengal Tenancy Act.—(Contd.)

Secs. 50 (2), 102 (b) & 115—*Sec. 115 if can prevent tenant from falling back on Sec. 50.*

Sec. 115, B. T. Act, when it provided that the presumption under Sec. 56, shall not apply to a tenancy after the particulars mentioned in Sec. 102 (b) of the Act have been recorded, does not mean that if the entry in the Record of Rights regarding the tenants' *Sharahmuain* status is challenged they will not be at liberty to support that entry by falling back upon Sec. 50. The Record of rights carries a statutory presumption of correctness, and the tenant can always fall back on Sec. 50, in support of the entries. (*Dhavl J.*)

KAMESWAR SINGH & ORS. vs. HEM NATH JHA & ORS.

17 P.L.T. 748

Secs. 50(2), 103B, 104H & 115—*Suit under Sec. 104H—Entry in favour of tenant in Record of rights challenged—presumption that the tenant can avail of.*

In a suit under Sec. 104H, B. T. Act, when the entry in the Record of Rights in favour of the tenants is challenged, it is open to them to support its correctness by proof including the presumption laid down in Secs. 50(2) & 103B(3) of the Act. There is nothing to preclude this being done in Sec. 115. 27 C. W. N. 947 followed. (*Dhavl J.*)

KAMESWAR SINGH BAHADUR vs. BACHA KOERI & ORS.

A.I.R. 1936 Pat. 446=164 I.C. 98

Secs. 50(2) & 106—*Suit claiming certain jamas to be maurasi mukarari—plaintiff claiming benefit of presumption under Sec. 50(2)—defendant relying on collection papers—absence of entries relating to jamas in collection papers, if material.*

In a suit under Sec. 106 B. T. Act, by an occupancy raiyat, claiming certain jamas to be *maurasi mukarari*, the plaintiff claimed benefit of the presumption under Sec. 50(2) of the Act, by reason of his having been paying a uniform rent for over 20 years before the institution of the suit. The defendant landlords in rebut-

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ting the presumption relied upon their collection papers. *Held*, that the collection papers were admissible in evidence and were relevant to the question whether the jamas came into existence after the permanent settlement. The absence of entries relating to the jamas in the collection papers was to be taken into consideration, but its evidentiary value depended upon other facts disclosed in the case. (*Nasim Ali J.*)

ANANDA LAL CHAKRAVARTI & ORS. vs. NARAIAN CHANDRA BHATTACHARJA & ORS.

A.I.R. 1936 Cal. 481

Sec 52.—*Enhancement of rent for increase of area—deduction of 10 per cent to be made on area found by settlement authorities.*

When additional rent is to be imposed under Sec. 52 of the Bengal Tenancy Act for increase in area found on measurement made by the settlement authority as compared with the area originally settled by private survey, it is right that a deduction of 10 per cent should be made from the area of the settlement survey. (*M. C. Ghosh J.*)

JAYNUDDIN SHEIK & ORS. vs. RAMESH CH. ROY & ANR.

40 C.W.N 1022

Sec. 52—*Difference between the old section and the amended section.*

Apart from pottah and *kabuliat* in a case under Sec. 52 of B. T. Act, if the rent roll and counterfoil receipts were produced, under the old sub-section the landlord had to prove the practice of settling lands on measurement at the time when the area in excess was found out before institution of a the suit and when such practice was proved by him he got the presumption that the area had been entered on measurement in his rent roll. Under the amended sub-Sec. the landlord has to prove the said practice prevalent at the time when the rent roll containing the areas of the holding was prepared and if he proves the practice he carries the presumption further back, that is, to the date of the creation of the tenancy, that is

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to say, the Court is to presume that the tenancy had been created after measurement. (*R. C. Mitra J.*)

PORT CANNING & LAND IMPROVEMENT CO. LTD. vs. SARADA PROSAD DALAL.

39 C.W.N. 668=62 C.L.J. 251

Sec. 52 (1) (a)—*Liability of tenant to pay additional rent, how determined.*

By Sec. 52, B. T. Act, the tenant is liable to pay additional rent for all lands proved by measurement to be in excess of the area for which rent had been previously paid by him. The words "area for which rent had been previously paid," mean the area with reference to which rent was assessed or adjusted. In order to prove the area for which rent was being previously paid it is not necessary for the plaintiff to prove the area of the tenancy at its inception. In order to determine whether the landlord would be entitled to additional rent, the question which has to be solved is whether the tenant in occupation of the land for which no rent has been assessed and for which he is bound to pay rent. If since the date of the last assessment, he has encroached upon the adjoining waste of the landlord, he is liable for rent for the land encroached. If he has not encroached upon the adjoining waste and is in occupation of the same area which he possessed when the rent was last assessed he may be liable to pay the additional rent if it is proved that rent was not assessed at a consolidated sum upon the entire area found in his possession, but upon an assumed area, or upon an area determined by measurement as the area in his possession. (*Nasim Ali & Edgley, JJ.*)

GOPAL CH. CHANDA vs. O. K. NAG & CO, LTD. & ORS.

A.I.R. 1936 Cal. 375

Sec 52(6)—*Scope of the section.*

Sub-sec. 6 of Sec. 52 of the B. T. Act. merely enacts a rule of evidence and is accordingly a rule of procedure, and therefore that sub-section as amended applies to all

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actions, pending or future. (*R. C. Mitter J.*)

PORT CANNING & LAND IMPROVEMENT CO. LTD. vs. SARADA PROSAD DALAL.

39 C.W.N. 668=62 C.L.J. 251-163 I.C. 745

Sec. 70—*Order under the section, if a decree.*

An order under Sec. 70, B. T. Act is an order in a proceeding which does not start with a plaint, but with an application on which court fees are not payable as for a plaint. Such an order therefore cannot be said to be a decree. Furthermore, the fact that sub-sec. (5) of Sec. 70 directs that such an order shall be enforceable as a decree indicates that the order has not, *proprio vigore*, the force of a decree. (*Agarwalla & Varma JJ.*)

RAMESWAR PROSAD NARAIN SINGH vs. KUNJA BEHARI MAHTO.

17 P.L.T. 36=160 I.C. 27(1)=A.I.R. 1936 Pat. 125

Sec. 73 (as amended), proviso—*Scope of the section—section if applies when transferee from some co-sharer undertakes to pay only their arrears.*

The proviso to Sec. 73 of the Bengal Tenancy Act as amended deals with the cases where the liability to pay the entire arrears of rent due on the holding has been taken over by the transferee. Where the transferee has not undertaken to pay the whole of the arrears due as when he is a transferee from some of the co-sharer tenants and has only undertaken to pay the arrears due in respect of their shares, the proviso does not apply, and the transferee, the transferors and the remaining co-sharers are all jointly and severally liable for the entire arrears. (*R. C. Mitter J.*)

AMIRUL ISLAM vs. SARADA KUMAR SEN & ORS.

40 C.W.N. 149=165 I.C. 249

Sec. 74—*Old Kistibandi patta—instalment including small sum of moltana—rent shown as inclusive of moltana—moltana, if can be considered as abwab.*

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The instalments in a *kistbandi patta* included a small sum as *moltana* costs. The record of rights however showed the amount of instalment inclusive of the *moltana* as the rent. Held, that under the circumstances, the small excess amount was to be considered as part of the rent, and not as an *abwab* under Sec. 74, B. T. Act. (*Mi C. Ghosh J.*)

SACHINDRA KUMAR ROY ss. PURNA CH. PAL.

A I.R. 1936 Cal. 541

Secs. 76(2) & 77—*Right to construct permanent dwelling house, if extends to unrecognised transferee of non-transferable holding.*

The right to erect a dwelling house is a right belonging to the tenant and to no other. It belongs to the tenant by virtue of his relationship to the landlord and not by virtue of his rights of occupying the land. An unrecognised transferee of a portion of a non-transferable holding does not stand to the landlord in the relationship of tenant, and as such, there is no justification for holding that the transferee has the same right as the tenant. (*Lodge J.*)

JOGESH CHANDRA DAS vs. HEM CHANDRA GHOSH.

A I.R. 1936 Cal. 232 = 162 I.C. 617

Sec. 87—*Transfer of non-transferable holding, partly by private sale by raiyat, and partly in execution of decree against raiyat, if constitutes abandonment—purchase by landlord of a part, if gives him right to entire holding as on abandonment.*

The sale of an entire occupying holding, partly by private treaty by the raiyat himself, and partly in execution of a money decree against him constitutes abandonment of the non-transferable holding. But if the landlord purchases a part of the holding, he cannot enter on the entire holding on the ground that the tenancy has been abandoned. (*R. C. Mitter J.*)

SAROJINI ROY vs. RAMESH CH. BISWAS.

62 Cal. 1110 = 40 C.W.N. 269 = 165 I.C. 199 = A.I.R. 1936 Cal. 536

Bengal Tenancy Act—(Contd.)

Sec. 87—*Occupation of a part of agricultural portion of holding by transferor of the same—underlease and payment of rent by transferee—abandonment or repudiation of tenancy if established.*

When the holder of a non-transferable ryoti holding transfers the holding but remains in possession of a part of the same under a sub-lease by the transferee, whether such part be the homestead or agricultural land, and the transferee has been paying rent to the landlord in the transferor's name, there is neither abandonment nor repudiation of the tenancy. (*Nasim Ali J.*)

SASTHI CHARAN BANIK vs. MANINDRA LAL SINGH.

40 C.W.N. 155 = 162 I.C. 250 = A.I.R. 1936 Cal. 168

Secs. 94 & 99—*Power of District Judge to remove common manager appointed by proprietors pursuant to notice under Sec. 94.*

Where a common manager is appointed by the proprietors of an estate themselves pursuant to a notice issued to them under Sec. 94, B. T. Act, the District Judge has no jurisdiction under Sec. 99 to remove such manager and restore the estate to the proprietors. (*Nasim Ali & Edgley JJ.*)

JOGENDRANATH MUKHERJEE vs. KHITISH ROY CHOWDHURY & ORS.

40 C.W.N. 1312

Sec. 102 (dd)—*Power of Settlement Officer to decide disputes between two neighbouring proprietors.*

Under the provisions of Sec. 102(dd), B. T. Act, a Settlement Officer has authority to decide a dispute between two neighbouring proprietors. (*M. C. Ghosh J.*)

HUMAYAN RAJA CHOWDHURY & ANR. vs. JYOTIRMOYEE DEBI.

A.I.R. 1936 Cal. 452

Sec. 104H *Scope of the section—powers conferred on the Civil Courts by the section.*

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Sec. 104 H. B. T. Act, contains a special provision of the law entitling the Civil Court to interfere with the fair rents that the revenue authorities are to settle under Secs. 104 to 104J. It empowers any person aggrieved by an entry of a rent settled in the Settlement Rent Roll, etc., to institute a suit in the Civil Court within six months from the final publication of the Record of Rights, etc., on any of the grounds stated in Sub-sec. (3) and on no others. (*Dhavlé J.*)

KAMESHWAR SINGH & ORS. vs. HEM NATH JHA & ORS.

17 P.L.T. 747

Sec. 104J—*Progressive rent for a number of years till a maximum rent reached to remain in force for period of existing settlement—in revision of settlement, rent, if can be further enhanced.*

The plaintiff sued for a declaration that the rent payable by him for the raiyati holding held by him was not liable to enhancement, as according to the entry in the settlement record, there was progressive rent for a certain number of years till a maximum rent was fixed which was to be in force till the end of the existing settlement. There was no mention about the rent to be paid after the period of that settlement. *Held*, that the rent was not fixed in perpetuity, and there could be no bar to the rent being enhanced when there was the occasion for a revision of settlement. (*Guha & Khundkar JJ.*)

MAHIM CH. GUHA DEB BARMAN vs. SECRETARY OF STATE.

A.I.R. 1936 Cal. 300

Secs. 104J & 111A—*Area of tenancy and rent for the same settled by Revenue Officer—matter if may be re-opened by suit for declaration under Sec. 111A.*

Where the main reliefs prayed for, relates to the question of area of the tenancy and to the question whether the rent payable by the tenant is liable to enhancement or not, it is incumbent upon the plaintiff to proceed under Sec. 104J if he wants to have the question of area decided and to have the question of rent settled by Revenue Officers

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reopened, and this cannot be allowed to be done by an indirect method of having a declaration under Sec. 111A, B. T. Act. The Civil Court would not be justified in granting a discretionary relief by way of declarations, if the remedy by way of consequential relief is unquestionably barred, and which consequential relief is the ultimate object of the relief prayed by way of simple declarations. (*Guha & Khundkar JJ*)

MAHIM CH. GUHA DEB BARMAN vs. SECRETARY OF STATE.

A.I.R. 1936 Cal. 300

Sec. 105—*Suit for assessment of rent of land recorded as liable to rent—suit when barred.*

In order that the landlord's right to assess rent might be barred, it is necessary that there must be an assertion by the man in possession to hold that land rent free, that the assertion must be made to the knowledge of the landlord, and that the assertion must be made to the knowledge of the landlord beyond twelve years of the institution of the proceedings for assessment. 39 Cal. 453 & 57 Cal. 796 relied on, (*M.C. Ghosh & R. C. Mitter JJ.*)

ANANDA LAL CHAKRAVARTI vs. GIRINDRA CHATTERJEE.

A.I.R. 1936 Cal. 483

Secs. 105 & 105A—*Proceedings under Sec. 105—Raising issues under Sec. 105A—Proper court-fee on application—Appeal from decision of Revenue Officer—Proper court-fee on memorandum of appeal.*

In application under Sec. 105, B. T. Act, which also raise issues under Sec. 105A, as also memoranda of appeals against decisions of Revenue officers in such proceedings, the proper court-fee payable is under the Government Notification issued under Sec. 105 cl. (3), a fee of 12 as. for each tenancy and in addition thereto ad-valorem fee on the value of the relief sought in respect of each tenancy; subject to a maximum of Rs. 20/-. In such cases, the principle laid down for determining the value of suits and memoranda of appeals under Sec. 7(ii) of the Court-fees Act should be applied, and ten

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times the difference between the rent claimed and the rent recorded in the Record-of-rights should be taken to be the value of the relief sought in respect of each tenancy, 59 Cal. 997 followed. (*Nasim Ali & Henderson JJ.*)

CHARUSILA DASI vs. ABHILAS BAURI
40 C.W.N. 1149 = A.I.R. 1936 Cal. 804

Secs. 105 & 109—Claim for additional rent for un-assessed land not pressed—Suit for enhancement of rent, if barred.

The plaintiff instituted proceedings under Sec. 105, B. T. Act, before the Revenue Officer, for additional rent for unassessed land of a certain tenancy. The claim for additional rent was not pressed. *Held*, that this did not preclude the plaintiff from suing the tenant in the Civil Court for increasing the rent of the tenancy. 35 C. W. N. 1147 relied on. (*Nasim Ali & Edgley J*)

GOPAL CH. CHANDA vs. K. C. NAG & CO. LTD.

A.I.R. 1936 Cal. 375

Sec. 109 - Suit under Sec. 106 dismissed as time barred—plaintiff still continuing in possession—subsequent suit for declaration of title by adverse possession—suit, if barred.

Certain lands purchased by the plaintiff having been recorded during the revisional settlement in the name of the defendant, the plaintiff brought a suit under Sec. 106, B. T. Act. This suit was dismissed on the ground of limitation, but the plaintiff notwithstanding the dismissal continued in possession, and twelve years later brought a suit for declaration of his title acquired by adverse possession. The defendants contended that this suit was barred by the provisions of Sec. 109, B. T. Act. *Held*, that the suit was not barred because the subsequent suit was based on a new cause of action and the subject matter of the subsequent suit was not the same as the subject matter of the previous suit. (*Courtney Terrell & Dhave JJ.*)

NIMAI CH. DAS vs. SURENDRA NATH GHOSH.

17 P.L.T. 459 = A.I.R. 1936 Cal. 606

Bengal Tenancy Act—(Contd.)

Sec. 109—Suit barred under Sec. 109 as it stood before amendment, if may be revived after amendment.

The amended provisions of Sec. 109, B. T. Act cannot revive a right which was extinguished. The new provision introduced by the amending Act either by express words or by necessary intendment has not taken away the right of the tenant sprung up before the amending Act. Therefore a suit for assessment of fair and equitable rent barred under Sec. 109 of the B. T. Act before its amendment cannot be maintained by reason of the new law introduced by the amending Act of 1929. (*Nasim Ali J.*)

KANDAN MAJHI vs. KULADA PROSAD ROY.

39 C.W.N. 1040 = 62 C.L.J. 347 = 163 I.C. 631

Sec. 109, Proviso—Proviso if affects substantive right or procedure.

The proviso to Sec. 109, B. T. Act does not affect the right to have a fair rent settled or the right of action in respect thereof, but only the question of the Court in which the right is to be enforced and the action brought, which is a question of procedure. The proviso may therefore be and is to be given the widest possible operation. (*Nasim Ali & Edgley JJ.*)

SUPROVAT CH. vs. BHUPATI BHUSAN MONDAL.

40 C.W.N. 773 = 63 C.L.J. 585 = 165 I.C. 294 = A.I.R. 1936 Cal. 307

Sec. 109 Proviso—Application under Sec. 105, made before but withdrawn after amendment and civil suit instituted—such suit if barred.

The proviso to Sec. 109 of the Bengal Tenancy Act introduced by the amending act of 1929, applies to a case in which the application under Sec. 105, though made before the amendment, was withdrawn as well as the suit in the Civil Court instituted after the amendment had come into force. Accordingly, such a suit in the Civil Court is maintainable. (*Nasim Ali & Edgley JJ.*)

SUPROVAT CH. vs. BHUPATI BHUSAN MONDAL.

40 C.W.N. 773 = 63 C.L.J. 585 = 165 I.C. 294 = A.I.R. 1936 Cal. 307

Bengal Tenancy Act—(Contd.)

Sec. 111. proviso—*Suit for declaration of plaintiff's right and declaration that entry in settlement record wrong—Cause of action.*

A wrong entry in the Record of Rights prepared under Chap. X of the B. T. Act itself furnishes to the person in respect of whose rights the wrong entry is made, a cause of action for bringing a suit for the declaration of his right irrespective of whether a personal injury to his right is threatened or not. But the plaintiff is not bound to institute a suit for declaration that the entry is wrong. He can wait and when invasion on his right is made on the basis of the entry, he can come and sue for a declaration of his title on the ground that the record is wrong. Such a suit will be in time if brought within six years of the threatened invasion. (*R. C. Mitter J.*)

KIRON CH. ROY vs. TARAK NATH GANGOPADHYA.

40 C.W.N. 566=A.I.R. 1936 Cal. 456

Sec. 115—"Thereafter"—significance of the word.

The word "thereafter" in Sec 115, B. T. Act, clearly refers to the time after the particulars have been finally recorded after recourse to all the provisions contained in Chap. X of the Act for the attainment of finality in this respect, 49 Cal. 919 followed. (*Dhavit J.*)

KAMSEWAR SINGH BAHADUR vs. BACHA KOERI.

A.I.R. 1936 Pat. 446=164 I.C. 98

Sec. 115C—Power of Special Judge to reject memorandum of appeal for non-payment of court-fee demanded—Appeal against order rejecting memorandum of appeal.

A Special Judge has power to reject a memorandum of appeal which is insufficiently stamped when the appellant fails to supply the necessary court-fees on being asked to do so. No appeal lies against an order so rejecting a memorandum of appeal. 59 Cal. 388 followed. (*Nasim Ali & Henderson JJ.*)

CHARUSILA DASSI vs. ABHILAS BAURI & ORS.

40 C.W.N. 1149=A.I.R. 1936 Cal. 804

Bengal Tenancy Act—(Contd.)

Sec. 120—Evidence of land being Khamar of proprietor—standard of proof required.

Sec. 120 of the B. T. Act, has laid down the standard of proof required when certain lands are claimed to be Khamar lands of the proprietor, for example, khas cultivation by the proprietor for 12 years before the passing of the B. T. Act, village usage recognising a parcel of land to be Malik's Khamar and so on in, fact, any piece of evidence relevant under the Evidence Act would be admissible and will have to be weighed by the Court. 53 I. A. 164 relied on. (*R. C. Mitter J.*)

UMA CHARAN BISWAS vs. DEBENDRA NATH PODDAR—

43 C.W.N. 119=164 I.C. 1001.

Sec. 146A - Rent decree against transferee of non-transferable holding after its transfer—sale in execution of the decree—rights of the purchaser.

The registered tenant of a non-transferable holding having transferred his interest to a third party, the landlord brought a suit for rent against the transferee of the holding. At the time of the institution of the suit, the transferee was not in possession of the holding and was not entitled to it. Held, that the suit by the landlord could not be said to be a suit for rent against a person representing the holding. Therefore a person who purchased the holding in execution of the decree for rent passed in the said suit could get nothing by the purchase. (*R. C. Mitter J.*)

MAHADEB PAL vs. SHIBU CHARAN PAL.

63 Cal. 428=62 C.L.J. 147=163 I.C. 721

Sec. 148(o)—Decree obtained by owner of life estate for rent and putni lease granted by her if may be executed by executors of her Will who are also legatees of decretal amount and outstanding profits of property.

An application for the execution of a decree obtained by the owner of a life estate in certain properties for the arrears of rent

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of putni lease granted by her of the said properties is not maintainable after her death by the executors of her Will who are also legatees of the decretal amount—the landlord's interest not being vested in such applicants for execution. It makes no difference that the putni has ceased to exist with the demise of the grantor. (*Guha & Bartley, J.J.*)

AKHIL KANTA LAHIRI & ANR vs. ASWINI KUMAR BHATTACHARJI & ORS.

40 C.W.N. 589 = 165 I.C. 531 = A.I.R. 1936 Cal. 464

Sec. 148A—Decree, if may be challenged in subsequent proceedings on ground of non-compliance with provisions of Sec. 148A, Sub-sec. 9.

A decree passed in a suit for rent framed under Sec. 148A, Sub-sec. 1 of the B. T. Act cannot be challenged in a subsequent proceeding on the ground that there was no compliance with the provisions of Sub-sec. 9 of Sec. 148A of the Act. (*R. C. Mitter J.*)

KALIPADA BHANDARI vs. PANCHKARI MANDAL & ORS.

40 C.W.N. 531 = 162 I.C. 623 = A.I.R. 1936 Cal. 197

Sec. 149 (3)—Decree in a suit under the section, if appealable.

An appeal lies against a decree passed in a suit under Sec. 149 (3) of the Bengal Tenancy Act. (*M. C. Ghosh J.*)

GYANODA CH. BANERJEE vs. DHARAMI MOHAN ROY.

62 C.L.J. 287

Sec. 153—Question as to whether certain rent is payable or nothing at all, if one deciding question of amount of rent annually payable—Second appeal, if lies.

It is difficult to distinguish on principle a case of total suspension of rent from a case of abatement of rent or a decree for rent at a rate lower than that claimed by the plaintiff. Where the question is whether

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a certain rent is payable or nothing at all is payable, the question is one relating to the amount of rent payable by the tenant to the landlord, and as such a second appeal is competent. 34 I. C. 851 relied on. (*Nasim Ali & Henderson J.J.*)

SABARATULLA SHEIKH vs. MANIKJAN BIBI.

A.I.R. 1936 Cal. 323

Sec. 153—Rent decree for less than Rs. 50 by munsiff and no question within proviso decided either in the trial or in appellate Court—Second appeal, if lies.

Where a Munsiff having jurisdiction passes a rent decree for a sum less than Rs. 50/- and does not decide any question coming within the proviso to Sec. 153 of the B. T. Act, and no appeal being taken the appellate Court also does not decide any such question, no second appeal lies although an appeal to the lower appellate Court was incompetent. (*R. C. Mitter J.*)

AMIRUL ISLAM vs. SARODA KUMAR SEN & ORS.

40 C.W.N. 149 = 165 I.C. 249

Sec. 153(a)—Suit for recovery of rent less than Rs. 100—defendant's plea of deduction on account of mafi—second appeal, if maintainable.

In a suit for rent of less than Rs. 100/-, the defendants claimed they were entitled to set off a certain sum on account of mafi. Held, that mafi not being rent, but only payment for services rendered, the dispute between the parties was not for rent, and did not fall within the meaning of the exception to Sec. 153, B. T. Act. (*Agarwallah J.*)

DHARMANATH vs. MANGALA PERSAD.

17 P.L.T. 241

Sec. 153, Proviso—High Court if can interfere in revision with an order by the District Judge refusing to entertain an application under Sec. 153, proviso.

The High Court has power in a proper case to interfere in revision with an order passed by the District Judge dismissing an

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application in revision under Sec. 153, *proviso*, Bengal Tenancy Act. (*Macpherson J.*)

RAMESWAR SINGH vs. MAHABIR PASI
A.I.R. 1936 Pat. 402

Sec. 153, Proviso—*Question between the transferor and transferee of ryoti holding as to liability for rent for period prior to transfer, if question within proviso.*

A question between the transferor and the transferee of an occupancy holding as to the liability for rent for a period prior to the transfer is not a question within the proviso to Sec. 153, B. T. Act (*R. C. Mitter J.*)

AMIRUL ISLAM vs. SARADA KUMAR
SEN & ORS.

40 C.W.N. 129 = 163 I.C. 249.

Sec. 155—*Lease containing covenant not to alienate—transferee from lessee, if entitled to benefit of the section.*

Sec. 155, B. T. Act, enables the Court to relieve against forfeiture in a suit for the ejectment of a tenant on the ground *inter alia* that he has broken a condition on the breach of which he is under the terms of a contract between him and the landlord, liable to ejectment. A transferee from a lessee who is bound by a covenant not to alienate is not a tenant, and therefore is not entitled to the benefit of the section. 21 C. W. N. 117 relied on. (*Agarwala & Dhavle JJ.*)

THAKUR DAYAL SINGH vs. PROMOTHO
NATH MITRA.

15 Pat. 673 = 17 P.L.T. 502 = A.I.R.
1936 Pat. 493 = 164 I.C. 811(2).

Sec. 155 (1) (a)—*Suit for ejectment of a raiyat at a fixed rate of rent instituted in 1920—cause of action arose before 1928—provisions of the new Act, if applicable.*

In a suit under Sec. 153 (1) (a), B. T. Act, for ejectment of a raiyat holding at a fixed rate of rent, when the cause of action arose before the amendment of the Act in

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1928, the provisions of the old and not the amended Act is applicable, even though the suit for ejectment was instituted after the amended Act had come into force (*Jack.*)

SHIB CH. SARKAR vs. PANCHANAN
KOLEY.

62 C.L.J. 71.

Secs. 159 & 167—*Suit for possession of property purchased at rent sale—Claim resisted by mortgage purchaser purchasing property in execution of mortgage decree—Right of such persons.*

A suit for possession of property purchased at a rent sale was sought to be resisted by certain persons who claimed to have purchased the property at a sale in execution of a mortgage decree held by them. It was found that the mortgage was subsisting at the date of the rent sale; the rent sale was prior in time to the sale in execution of the mortgage decree but the property was purchased by the mortgagees within a year of the rent sale. The rights of the mortgagees under the mortgage were not annulled. *Held*, that the sale under the mortgage did not for all purposes extinguish the mortgage and the mortgagees who purchased at the mortgage sale could fall back upon the mortgage and use it as a shield against the purchaser at the rent sale. The purchaser could not therefore recover possession of the property unless he redeemed the mortgage. 43 All. 469 & 35 C. L. J. 1 relied on. (*Guha & Bartley JJ.*)

ANNADA PROSAD CHATTERJEE vs. PHA-
NINDRA BHUSAN GHATAK.

A.I.R. 1936 Cal. 351.

Sec. 163—*Application for attachment and sale under Sec. 163 (2) (a), but use of wrong form and proceedings taken under Sec. 163 (2) (b)—effect of—if a rent sale.*

Where the landlord applied for attachment and sale according to the provisions of Sec. 163(2)(a) of the B. T. Act, but through some mistake, a wrong form was used and proceedings were taken under Sec. 163 (2) (b) of the Act, and it was stated in the sale proclamation that the sale would be with power to avoid any incumbrance of

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occupancy holding though in the sale proclamation and the sale certificate the property was described as Mokrari interest of the judgment debtors, held, that the sale had the effect of a rent sale under Chap. XIV of the Bengal Tenancy Act. (*D. N. Mitter & Patterson JJ.*)

MOHENDRA NATH BANERJEE vs. RANI HARSHAMUKHI DASSI & ORS.

40 C.W.N. 103=164 I.C. 490.

Sec. 170—Execution of rent decree—claim under Or. 21, r. 58—legality of.

The remedy by claim under Or. 21, r. 58, C. P. Code, is intended to be barred in all cases where the holding is put to sale for its own arrears; the only way of preventing the same from taking place is payment of the decretal amount. But it is always open to a claimant under r. 58, to show that the decree sought to be executed was not a rent decree in order to bring it within the purview of Or. 21, r. 58. (*Agarwalla & Rowland JJ.*)

SURPAT SINGH vs. SITAL SINGH.

15 Pat. 614=162 I.C. 605=17 Pat. L.T. 385=A.I.R. 1936 Pat. 480.

Sec. 174—Application to have sale set aside by person whose interest is affected—Decree-holder, obtaining order of attachment but property not actually attached before sale, if entitled to apply.

A decree-holder who has applied for and obtained an order of attachment of some properties has a pecuniary interest in the properties and is entitled to apply to have a sale of those properties in execution of another decree set aside under Sec. 174, B. T. Act or under Or. 21, r. 90, C. P. Code, although the actual attachment of the properties had not been made before the date of the sale. (*R. C. Mitter J.*)

BULANDA BASHINI DASSI vs. PRAN GOBINDA DHAR.

40 C.W.N. 1334=63 C.L.J. 554=A.I.R. 1936 Cal. 547.

Sec. 174(1)—Section, if bars setting aside of sale on application by decree-holder

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auction purchaser on foot of payment of decretal amount out of Court.

Where the auction purchaser at a rent sale under the B. T. Act is the decree-holder himself, and he and the judgment-debtor, on payment of the decretal amount and compensation out of Court after the sale, have agreed that an application, for setting aside the sale in accordance with the adjustment shall be made by the decree holder, the Court is bound to set aside the sale on such an application, although the procedure may be contrary to Sec. 174 (1) of the Act. (*R. C. Mitter J.*)

BANGA CH. MOZUMDAR vs. NANDA K. MOZUMDAR.

40 C.W.N. 1402.

Sec. 174, Cl. (1)—Person obtaining attachment before judgment of property subsequently sold in execution of a rent decree, if entitled to apply under the section.

A person who has obtained only an attachment before judgment of a property which is subsequently sold in execution of a rent decree but who has not before the date of his application obtained a decree in his suit is not entitled to apply under Sec. 174, cl. (1) of the B. T. Act to have the sale set aside. (*R. C. Mitter, J.*)

BAIDYANATH CHARAN PANDE vs. HEM-LATA DASSI & ORS.

40 C.W.N. 759=160 I.C. 1080=A.I.R. 1936 Cal. 36.

Sec. 174, Cl. 3 (b)—Deposit contemplated by the section, if imperative,

The deposit contemplated by Sec. 174, cl. 3(b), Bengal Tenancy Act is imperative, and if the provisions contained in that clause are not complied with, the Court would be exercising its jurisdiction in an irregular manner. So, in the absence of special circumstances, namely, that the court was satisfied that no deposit was necessary, and in the absence of any reason having been recorded by the court in writing, the sale cannot be set aside unless the amount

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recoverable is deposited. (*McNair & Henderson JJ.*)

PROBODH CH. BASU vs. KUNJA LAL GHOSAL & ORS.

39 C.W.N. 913=62 C.L.J. 308=163 I.C. 731

Sec. 174(3), proviso (b)—*Application to set aside sale on the ground of material irregularity and fraud—Deposit of amount recoverable in execution, if necessary before application can be entertained.*

The deposit of the amount recoverable in execution as contemplated in proviso (b) to Sub-Sec. 3 of Sec. 174 of the B. T. Act is not necessary to be made at the time of making the application. It is only before such an application can be granted that the deposit must be made. 60 C. L. J. 1 2, 39 C.W.N. 1176 & 61 Cal. 338 referred to (*Cunliffe & Henderson, JJ.*)

AJIT KUMAR BASU vs. SURENDRA NATH MONDAL & ORS.

40 C.W.N. 528=165 I.C. 387=63 C. L.J. 19=A. I.R. 1936 Cal. 430

Sec. 174(3), proviso (b)—"Allowed"—*Meaning of—Deposit of amount recoverable, if must be made before application to set aside sale can be entertained.*

The word "allowed" in proviso (b) to Sub-Sec. 3 of Sec. 174 of the B. T. Act is equivalent to "granted." Therefore it is not necessary for the applicant applying for having a sale set aside to make the deposit of the amount recoverable in execution as contemplated by the proviso at the time of making the application as a condition precedent to his application being entertained. 61 Cal. 338; 39 C.W.N. 1176 & 40 C.W.N. 526 followed; 60 C.L.J. 112 considered. (*S. K. Ghose & Elgley, JJ.*)

BHOLANATH ROY CHOWDHURI & ORS. vs. HAZI SYED MOHAMMAD MAHJUD.

40 C.W.N. 528

Sec. 174(3), proviso (b)—*Deposit, when to be made*

The deposit of the decretal amount contemplated by Sec 174, cl. 3, proviso (b) of

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the B. T. Act, can be made at the time the application is allowed. 59 C.L.J. 69 followed; 60 C.L.J. 112 distinguished. (*Henderson & Khundkar JJ.*)

GUNARBINNESSA CHOWDHURANI & ORS. vs. GOPENDRA PRASAD SIKUL & ORS.

63 Cal. 49=62 C.L.J. 358=39 C.W.N. 1176=163 I.C. 72=A.I.R. 1936 Cal. 275

Sec. 174 (3), proviso (b)—*Deposit of amount recoverable in execution when to be made.*

The deposit of the amount recoverable in execution contemplated by the proviso to Sub-Sec. 3 of Sec. 174 of the B. T. Act has to be made not along with the application to have the sale set aside but has to be made before such application is allowed, that is to say, the proper time for the Court to call for the deposit under that provision is after the Court has come to the conclusion that the sale ought to be set aside. (*R. C. Mitter, J.*)

KALIPADO BHANDARI vs. PANCHKORI MANDAL.

40 C.W.N. 531=162 I.C. 623=A.I.R. 1936 Cal. 137

Sec. 174 (5)—*Sale in execution of rent decree obtained by co sharer landlord—application by another co-sharer for setting aside sale refused but sale declared to be one in execution of money decree on finding of non service of notice under Sec. 148 (a) (7)—decree holder whose sale upheld, if entitled to appeal against finding as to character of sale—revision, if lies.*

If on the application of a co-sharer landlord for setting aside a sale held in execution of a rent decree of another co-sharer the Court refused to set aside the sale, but on the finding that notice under Sec. 148 (a) (7) had not been served observed that the sale is to be considered to be a sale in execution of money decrees, the co-sharer, at whose instance the sale was held, can and has to proceed against the observation by way of an appeal under Sec. 174(5), and therefore no revision lies. (*Khundkar J.*)

KHAGENDRA NATH BARUI vs. SARAT KUMAR DAS & ANR.

40 C.W.N. 1812

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Sec. 178, proviso I—*Kabuliyat purporting to be for reclaiming purpose—interest stipulated at the rate of one anna per rupee per mensem if legal and valid.*

Where it appeared from the terms of a document executed in 1876 that it was a demise in favour of tenants of land covered by forests consisting of timber and nails and the purpose as evidenced by its contents was reclamation and all the terms usually present in a reclamation were present in the document in question, *held*, that the document in question was a bonafide lease for reclaiming purpose such as to attract the operation of Sec. 178, proviso I of the B. T. Act. And as such the claim for interest at the rate of one anna per rupee per mensem under the terms of such document was legal and valid. (*Guha & Khundkar JJ.*)

UPENRA NATH DAS & ORS. vs. SURENDRA NATH ROY SARKAR & ORS.
63 C.L.J. 283

Sec. 179—*Contract in mourasi mokarari lease that tenant would surrender land on payment of selami paid within a fixed period if valid—occupancy right, if may be set up against such contract.*

Where the tenant at the time of taking mourasi mokarari lease of certain lands stipulated by a separate *ekranama* that he would surrender the lands and the mourasi mokarari patta, if within a certain period fixed, the landlord repaid the amount of selami taken by him *held*, that the contract was valid and binding one between the parties, and the tenant could not defeat it by setting up an occupancy right. (*Guha & Bartley JJ.*)

SHIB NARAIN GHOSE vs. GOPAL CH. GHOSH.

40 C.W.N. 1368

Sec. 182—*Right of occupancy acquired in homestead land—effect of subsequent sale of agricultural land.*

Where a ryot being a settled ryot of a village acquires occupancy right in a piece of homestead land under Sec. 182 of the B. T. Act, and subsequently sells away the

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agricultural holding, such sale does not divest him of the occupancy right in the homestead land. (*Nasim Ali J.*)

HARU CHARAN MANNA & ORS. vs. SAURENDRA NATH GHOSH & ANR.
40 C.W.N. 132(1)

Sec. 182—*Holding acquired by raiyat subsequent to homestead—benefit of Sec. 182 if can be claimed.*

When a raiyat holds his homestead otherwise than as a part of his holding, he is entitled to the benefit of Sec. 182, B. T. Act, although he may have become a raiyat subsequently to the taking of his residential tenancy. 40 C.W.N. 599 followed. (*Edgley J.*)

KALI KUMAR DEB & ORS. vs. SECRETARY OF STATE.
A.I.R. 1936 Cal. 528

Sec. 182—*Old section, if governs tenancy of homestead terminable by notice to quit when tenant subsequently acquires status of ryot.*

Where a ryot holds his homestead otherwise than as a part of his holding, he is entitled in respect of the homestead to the benefit of Sec. 182 of the B. T. Act, although he may have become a ryot subsequently to his taking the residential tenancy and although in respect of the latter he may have accepted by *Kabuliat* a tenancy terminable by notice to quit. (*Nasim Ali & Handerson JJ.*)

PULIN CH. DAW vs. ABU BAKHAR NASKAR.

40 C.W.N. 599 = 163 I.C. 406 = A.I.R. 1936 Cal. 565

Sec. 182 (as amended in 1928)
Provisions of the section if applicable to tenancies in existence at the date of passing of amending Act.

Sec. 182, B. T. Act, as amended by the amending Act of 1928, became applicable to tenancies which were in existence at the time of the passing of the Act. Raiyats and under-raiyats holding tenancies on that

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date became entitled to the benefit of the new section and were entitled to hold their homestead subject to the provisions of the Act as amended. The incidents of their homestead were from that date to be governed by the provisions of the new Act applicable to raiyats and under raiyats. (*Edgley J.*)

KALI KUMAR DEB & ORS. vs. SECRETARY OF STATE.

A.I.R. 1936 Cal. 525

Sec. 188—Duty of applicant under Sec. 26F (1)—such applicant if must invite other co-sharers to join as co-applicant or express consent—application without such statement, if bad.

Sec. 188 of the B. T. Act only requires the co-sharer applicants under Sec. 26F (1) to make the other co-sharer landlords parties either in the application originally filed or by an application or amendment made within one of the two periods of time mentioned in Sub-Sec. 4. (a). He is not required to invite the other co-sharers to become co-applicants or to express consent to their so doing and omission to insert such statement does not affect his application. (*R. C. Mitra J.*)

SACHINDRA NATH CHAKRAVARTI vs. TRAILOKHYA NATH CHAKRAVARTI & ANR.

40 C.W.N. 1023=A.I.R. Cal. 576

Sec. 3, Art 3—Rule of special limitation if applies when dispossession is by landlord as auction purchaser and through Court—usufructuary mortgagee from tenant, if subject to rule.

The rule of special limitation that a tenant must bring a suit for recovery of possession within two years from the dispossession by the landlord, is not excluded when the landlord dispossesses as auction purchaser in execution of a money decree and takes delivery of possession through Court. Usufructuary mortgagees from the tenant who are in possession at the time of such dispossession are equally affected by the rule, 31 C. W. N. 634 followed. (*Nasim Ali & Henderson JJ.*)

SHAIK ALAM vs. ATUL CH. RAI.

40 C.W.N. 173=163 I.C. 84=A.I.R. 1936 Cal. 299

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Sch. 3. Art. 3 Principle of construction—dispossession by co-sharer landlord if comes within the article.

The provision as to the special period of limitation in Art. 3 of Schedule III of the B. T. Act must be considered strictly against the party seeking to apply the same. The dispossession effected by the act of delivery of possession by the Court to a co-sharer landlord is not such dispossession as would bring the case within Art 3 of Schedule III of the B. T. Act. (*Guhu & Lodge JJ.*)

GOSTO BEHARI PRAMANIK vs. AMIYA KUMAR DAS.

63 Cal. 503=40 C.W.N. 135=165 I.C. 135

Sec. 7 (1) (3)—Person entitled to vote as having place of residence within Union—Mere residence, if sufficient, or title to place of residence necessary—Son living with father at residence of latter, if entitled to vote as person having place of residence or as a member of joint undivided family when cess paid by father.

In order to be qualified to vote at a Union Board Election as a person having a place of residence within the Union, it is not enough that one lives within the Union but it is further necessary that one should have some title to the place of residence. A son living with his father at a residence belonging to the latter is therefore not qualified. Even father, and son in such a case may be regarded as members of a joint undivided family if the cess is paid not by the family but by the father; the son is not qualified to vote as a member of a joint undivided family, even though he may be nominated by the father. (*Jack, J.*)

KASIRUPDIN TALUKDAR vs. MAFFI-ZUDDIN AHMED & ORS.

40 C.W.N. 753=165 I.C. 354=A.I.R. 1936 Cal. 295

Sec. 31—Provisions of the section if excludes public pathway over private land—Power of control how to be exercised.

Sec. 31 of the Bengal Village Self-Govt. Act does not apply to public halot the

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(Contd.)

subsoil under which is private property and accordingly the section gives no power to the Union Board to exercise control over it. Even if Sec. 31 applies to such a *halot* the Union Board can exercise control and the power of making improvements only in a manner consistent with the rights of user of the public. Consequently, where the public have acquired right of user of pathway as foot passage during the dry months and as a boat passage during the rainy season, the Union Board acting under Sec. 31, cannot raise it so as to obstruct totally its use as a boat passage. (*Guho & Bartley, J.J.*)

LALIT MOHAN SAHA & ORS. vs. DEBENDRA NATH THAKUR & ORS.

40 C.W.N. 838=165 LC. 231=A.I.R. 1936 Cal. 444

Sec. 31—*Passage used as a footpath for 9 months and as a boatway for three months, if a water way,*

A passage which is used as a footpath for 9 months of the year and as a boat way for the remaining three months of the year cannot be said to be a waterway within the meaning of Sec. 31, Bengal Village Self-Government Act. (*Guho & Bartley J.J.*)

LALIT MOHAN SAHA & ORS. vs. DEBENDRA NATH THAKUR & ORS.

40 C.W.N. 838=162 I.C. 281=A.I.R. 1936 Cal. 444.

Sec. 64—*Protection of the section, if available to Union Board not properly constituted.*

A Union Board or a member thereof is entitled to the protection of Sec. 64 of the Bengal Village Self-Government Act when the Board has been actually functioning although there may be a defect in its constitution. The protection of the section is not limited to legal proceedings brought for acts done bonafide under colour of office but extends to proceedings in respect of acts alleged to be malafide. (*M. C. Ghosh, J.*)

HEM CH. ROY CHOWDHURI vs. TARAPADA SANAYAL.

40 C.W.N. 500

Bengal Village Self Government Act.—
(Contd.)

Sec. 82—*Application to set aside ex parte decrees—deposit of decretal amount or security, if necessary.*

Deposit of the decretal amount need not be made or security for the same need not be furnished when the application to set aside a decree of a Union Court is made under Sec. 82 of the Bengal Village Self-Government Act; this is so even though the application comes to be tried by a Munsiff having Small Cause Court powers. (*R. C. Mitter J.*)

SM, PRAFULLA SUNDARI ROY CHOWDHURANI vs. AZIZUNNESSA & ORS.

40 C.W.N. 349=62 C.L.J. 295

Rules 6, 8, 9, & 38—*Jurisdiction of Civil Court to decide questions relating to the eligibility of candidates for election.*

Rules 6, 8, 9 and 38 framed under the Bengal Village Self-Government Act (1919) bar the jurisdiction of the Civil Courts to try the question whether a particular person was a qualified voter or not, and consequently whether his election was void on the ground of his not being a qualified voter. (*Guha & Bartley, J.J.*)

PURNA CH. CHOWDHURI vs. ALEP BISWAS.

40 C.W.N. 543=62 C.L.J. 535=A.I.R. 1936 Cal. 64=161 I.C. 183

BENGAL WAKF ACT. (XIII OF 1934).

Sec. 70 (1), (4)—*Commissioner, if entitled to question order appointing Receiver without notice to him in appeal pending when Act came into force.*

The words "suit or proceeding" in Sec. 70 (1) of the Bengal Wakf Act do not include an appeal. Accordingly, and also having regard to Sec. 83, clauses (a) & (b) of the Act, the Commissioner of Wakf is not entitled under Sec. 70(4) to question an order appointing a Receiver made in an appeal pending at the date when the Bengal Wakf Act came into force although the order as also the application thereof, may

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have been after that date. (*D. N. Mitter & Patterson JJ.*)

COMMISSIONER OF WAKFS, BENGAL
vs. MAHMUDA BIBI & ORS.

40 C.W.N 816=A.I.R. 1936 Cal. 480

BERAR CUSTOMARY LAW.

Right to Joshipan claimed as founded on immemorial user—Facts that must be proved.

Where the right to Joshipan in a particular village is founded on a customary right which has been in force in the village from time immemorial, it is not enough for the person claiming the right to prove that he belongs to *Watandar Joshi* family and has occasionally exercised Joshipan rights in the village; he must establish that he and his forefather have officiated in the particular village from time immemorial to the exclusion of every one else. (*Vivian Bose, J.*)

GANGADHAR MAROTI vs. SUNDAR NARAIN SANTHAN.

I.L.R. 1936 Nag. 13=A.I.R. 1936 Nag. 93=164 I.C. 825

BIHAR & ORISSA MUNICIPAL ACT. (VII OF 1922.)

Sec. 107 (2)—Alteration of assessment without notice—Legality of

The meaning of Sub-Sec. (2) of Sec. 107, Bihar and Orissa Municipal Act is to lay down a condition precedent to the alteration of an assessment. The increased taxation cannot be recovered until the alteration of the lease has been made as a condition precedent. Similarly, the effect of sub-sec. (2) is to make the issue of at least one month's notice of the proposal to make the alteration a condition precedent to the making of the alteration itself. Therefore the Commissioners are not entitled to alter any assessment without a month's notice as contemplated by Sec. 107 (2) of the Act, and it is no answer to the assessee's case that he had the benefit of the notice inasmuch as the merits of his objection was entertained by the Commissioners. (*Courtney Terrel, C.J.*)

LUCHMINARAIN DAS vs. CHAIRMAN, CUTTACK MUNICIPALITY.

17 P.L.T. 420 = A.I.R. 1936 Pat. 322 = 163 I.C. 131

Bihar & Orissa Municipal Act—(Contd.)

Sec. 377—Object and scope of the section.

Sec. 377, of the Bihar & Orissa Municipal Act, like the English Public Authorities Protection Act, and similar legislation in India, is for the purpose of protecting public authority from suits in respect of acts bonafide purporting to have been performed under the aegis of lawful title, but in which inspite of the bonafides of the public authority the law has been overstepped and tort has been committed. The section is not intended to apply to suits for the recovery of sums of money other than damages for tort which are lawfully recoverable either under Statute or at Common Law. (*Courtney Terrel, C. J.*)

LUCHMINARAIN DAS vs. CHAIRMAN, CUTTACK MUNICIPALITY.

17 P.L.T. 420=A.I.R. 1936 Pat. 322 = 163 I.C. 131

BIHAR & ORISSA VILLAGE ADMINISTRATION ACT (III OF 1922).

Secs. 57, 58 & 59—Panchayet Court, if has jurisdiction to transfer a decree for execution to Civil Court.

When in execution of a Decree passed by a Panchayet Court, a proportion of the decretal amount was realised, and the said Court transferred the decree to the Civil Court for execution, for realising the balance of the decretal amount, held, that there was no provision anywhere in the B. & O. Village Administration Act, save in the Special Panchayet Court of Chhotonagpur, for the transfer of a decree to a Civil Court for execution (*Courtney Terrel C.J. & Khawja Mohammad Noor J.*)

BANWARI LAL & ANR. vs. BADRIRAM.

17 P.L.T. 12=160 I.C. 345=A.I.R. 1936 Pat. 150

BIHAR TENANCY ACT, 1935.

Sec. 26N—Sale before 1923—consent of landlord, if may be presumed.

In a sale held before 1923, the consent of the landlord may be presumed, even if

Bihar Tenancy Act—(Contd.)

the purchaser is one of the co-sharers.
(*Wort J.*)

NAGA RAI vs. BUCHI RAI.

A.I.R. 1936 Pat. 285 = 162 I.C. 875

BOMBAY CITY MUNICIPAL ACT (III OF 1888).

Sec. 212—*Land leased out by Government—lessee defaulting in payment of Municipal taxes—Municipality is entitled to have a charge on the land.*

The Scheme of the City of Bombay Municipal Act is to levy taxes in respect of land and buildings, and then to impose a liability to pay the tax on persons having certain interests in the land and buildings, with the ultimate remedy, if the taxes are not paid, of a charge under Sec 212 on the land or buildings. The tax is charged specifically upon the building or land and not upon as particular interest therein. Hence where land belonging to Government is leased out by it to a person, and the lease is subsequently determined, the municipality is entitled to have a charge on the land in respect of unpaid municipal taxes. (*Beaumont C. J. & Rangnekar J.*)

SECRETARY OF STATE vs. MUNICIPAL CORPORATION OF THE CITY OF BOMBAY, & ANR.

59 Bom. 681

Sec. 212—*Tax leviable by Municipality on Railway lands, if a charge on such lands.*

A railway administration being liable under Sec. 135 of the Railways Act to pay Municipal taxes in respect of property owned by the Railway within the municipal area, a charge for the payment of unpaid taxes is created on the lands within the municipal area vested in the municipal administration. (*Beaumont C. J. & Rangnekar J.*)

SECRETARY OF STATE vs. MUNICIPAL CORPORATION OF BOMBAY.

59 Bom. 714.

BOMBAY CO-OPERATIVE SOCIETIES ACT (VIII OF 1925.)

Sec. 72A—(*Added by Bombay Act VIII of 1933*)—*Society registered under*

Bombay Co-operative Societies—(Contd.)

the Act of 1925, if a Company within the meaning of Sec. 3, Land Acquisition Act.

By virtue of the addition of Sec. 72A to the Bombay Co-operative Societies Act, 1933, by Act 8 of 1933 (which Act is a validating Act and is necessarily retrospective in operation), a Society registered under the Bombay Co-operative Societies Act must be deemed to be a "Company" as defined in Sec. 3, Land Acquisition Act. In consequence, it is now permissible and legal for the Local Government to acquire lands compulsorily for the benefit of such a Society, and if the acquisition proceedings are regular, the land vests in the Local Government. (*Barlee & Sen JJ.*)

SANTINIKETAN CO-OPERATIVE HOUSING SOCIETY, LTD & ANR. vs. MADHAB LAL AMIRCHAND & ORS.

60 Bom. 155 = A.I.R. 1936 Bom. 37

BOMBAY HIGH COURT RULES.

Rule 874—*Order for payment in favour of Solicitor made under R. 847, if may be execution.*

An order for payment in favour of a solicitor made under R. 874 of the rules made under the provisions of Sec. 129 C. P. C. is capable of being executed as if it were a decree. (*Jai Lal J.*)

SHIV DIAL BUKHTAWAR LAL vs. KANGA & CO.

38 P.L.R. 1101 = A.I.R. 1936 Lah. 369 = 162 I.C. 486

BOMBAY (REVENUE JURISDICTION ACT, (X OF 1876.)

Sec. 4—*Inam tenure if included under S. 4.*

Inam tenure is not a tenure of the kind specified in Sec. 4 Bombay Revenue Jurisdiction Act. To all tenures comprised under Sec. 4 there is attached an element of grace and of precariousness. (*Lord Roche.*)

VINAYAK RAO DHUNDIRAJ BIWALKAR vs. SECY. OF STATE.

A.I.R. 1936 P.C. 312 = 164 I.C. 753 = 64 C.L.J. 178 = 38 Bom. L.R. 1265

BUDDHIST LAW.

Adoption—Keittima—pre-requisites for keittima adoption.

A keittima child is a child of another taken and brought up to the knowledge of the public with the intention that the child shall inherit. No formal ceremony is necessary for this form of adoption. The intention of the person adopting that the child shall inherit and the publicity of the intention are the principle pre-requisites for this form of adoption. (*Mosely & Ba U JJ.*)

MA THAN NYUN vs DAW SHWE THIT.
14 Rang. 557=164 I.C. 292=A.I.R.
1936 Rang. 344

Adoption—Apatitha child—definition—distinction between apatitha and keittima child.

An apatitha child is one who has been adopted casually and without any intention expressed on the part of the adoptive parent that it shall inherit. An intention either express or implied on the part of the adoptive parent that the adopted child shall or shall not inherit forms the dividing line between a keittima child and an apatitha child. In other respects the position of an apatitha child is the same as that of keittima (*Mosely & Ba U JJ.*)

MA THAN NYUN vs DAW SHWE THIT.
14 Rang. 557=164 I.C. 272=A.I.R.
1936 Rang. 344

Adoption—Girl brought up from childhood—property acquired jointly with her money lent out in her name—status of the girl.

Where a girl was brought up from her childhood by a widow, who gave her ornaments and jewellery and purchased property and lent out money in the joint names of herself and the girl and described the girl as a joint donor with her of a *tazang*, held, that though these facts fell short of proving the girl as a keittima adopted daughter of the widow, it certainly proved her status as the apatitha child of the widow. (*Mosley & Ba U JJ.*)

MA THAN NYUN vs. DAW SHWE THIT.
14 Rang. 457=A.I.R. 1936 Rang. 344
=164 I.C. 272

Buddhist Law—(Contd.)

Adoption—Intention to adopt—manner in which it should be signified.

In order to establish an adoption on the basis of one who will inherit to the entire exclusion of relations by blood, there must be an intention of taking the adoptee as a son or daughter who will inherit and such intention must be publicly signified. This intention may be expressed at the time of the taking or later; or may be inferred from a long course of conduct making such intention public. The fact that a child has been brought up as a natural daughter does not necessarily indicate that the child should inherit. The fact that there is a natural daughter living requires stronger evidence than in an ordinary case, in which the alleged adoptive parents are childless, to prove such intention, and such intention should be clearly shown either by direct evidence or circumstances from which it may be safely inferred. (*Dunkely & Mya Bu JJ.*)

MA SEIN MAY vs. MA SAING.
A.I.R. 1936 Rang. 459=165 I.C. 358

Marriage—Wife if can claim from husband during subsistence of marriage money due as damages under a prenuptial contract.

Since a Burmese Buddhist wife cannot claim separate possession of the joint estate or a portion of it from her husband, and during the subsistence of the marriage the property belonging to one belongs to both, it is obvious that a Burmese Buddhist wife cannot make a claim against her husband during the subsistence of the marriage, for the recovery of a sum of money due as damages under a pre-nuptial contract owing to breach of some of its terms by the husband. (*Mya Bu & Baguley JJ.*)

U PO KHA vs. MA GYI,
A.I.R. 1935 Rang. 497=160 I.C. 824

Marriage—Promise of marriage by a man below age of majority if can form a binding contract.

The Burmese Buddhist law does not form the rule of decision of the question as to the validity of a promise of marriage

Buddhist Law—(Contd.)

by a Burmese Buddhist young man below the age of majority fixed by the Indian Majority Act. Therefore a Burman is not competent to enter into a valid or binding contract to marry in future until he has completed the age of 18 years. 40 I. C. 421, 52 I. C. 653 and 65 I. C. 411 overruled (*Page C. J. Mya Bu, Bnguley, Mosely & Ba U. JJ.*)

MAUNG TUN AUNG vs. MA E. KYI.

14 Rang. 315 = A.I.R. 1936 Rang. 212
165 I.C. 560

Marriage—Desertion of husband by wife if dissolves marriage.

According to the Buddhist Law, if a wife deserts her husband, the marriage is automatically dissolved at the end of one year from the date of desertion; and no further expressed act or volition on the part of the deserted party is necessary to effect such a dissolution. 5 Rang. 537 relied on. (*Ba U. J.*)

S. A. S. CHETTIAR FIRM vs. GYI & ANR.

14 Rang. 329 = A.I.R. 1936 Rang. 274
= 163 I.C. 600

Marriage—Co-habitation accompanied by agreement to marry in future, if can create change of status.

A marriage between Burmese Buddhists is created by co-habitation coupled with intention to become husband and wife. There must be an agreement to become husband and wife in present, but such an agreement differs altogether from a contract to marry in future, the latter agreement being antecedent to and forming no part of of the proposed marriage. Co-habitation accompanied by an agreement to marry in future does not create a change of status, although in cases where the parties to the agreement are competent to bind themselves by a contract to marry, and the agreement is broken, the co-habitation in certain circumstances may affect the quantum of the damages that are awarded as compensation for the breach of the contract. (*Page C. J. Mya Bu, Bnguley & Ba U. JJ.*)

MAUNG TUN AUNG MA E. KYI.

14 Rang. 215 = A.I.R. 1936 Rang. 212
162 I.C. 560

Buddhist Law—(Contd.)

Partition—Suit for partition on re-marriage of surviving parent—Extent of the estate subject to partition.

In a suit by a person for the partition of the estate of his parents on the remarriage of his surviving parent, the estate subject to partition is the estate held by the surviving parent at the date of the marriage and not such an estate to which the surviving parent might be legally entitled. (*Page C. J. & Mya Bu, J.*)

MAUNG SEIN BA vs. KYWE & ANR.

A.I.R. 1936 Rang. 107 = 161 I.C. 584

Succession—Woman other than undisputed wife claiming estate of deceased as another wife—proof required.

Amongst the Burmese, the term "wife" may be very loosely used. Therefore, where on the death of a person, a woman other than his undisputed wife claims a share in his estate as being another wife of his, she can only succeed by showing a clear and unequivocal recognition of her status as such in the legal sense of the term. (*Ba U & Parker JJ.*)

MA HLA MIN vs. MAUNG HLA U & ANR.

A.I.R. 1936 Rang. 464

Succession—Property obtained by woman from her father on his remarrying—woman contracting a second marriage—right of her children by her first marriage to the property.

Where property was obtained by a woman from her father on his second marriage as being her share of the joint property of her father's first marriage, and the woman contracted a second marriage and there were children by her first marriage, held, that the property which was the *letteipwa* property of her first marriage devolved upon her children by her first marriage, who obtained a vested interest in it upon the remarriage of their mother. (*Dunkley J.*)

KYI MAUNG & ANR. vs. S. N. V. R. CHETTIAR FIRM.

164 I.C. 392 = 1936 Rang. 336

Budhist Law—(Contd.)

Succession—Person inheriting estate, if takes it subject to payment of ancestor's debts.

A Burmese heir to an estate takes the property of his ancestor subject to the payment of the ancestor's debts. Where a second wife of a Burmese who takes by inheritance the property belonging to the first wife, such property is subject to attachment and sale in satisfaction of the debts of the first wife, 9 Rang, 524 followed. (*Dunkley J.*)

S. P. L. A. CHETTIAR FIRM vs. MA PU.
163 I.C. 604 = A.I.R. 1936 Rang. 262

Succession—Interest taken by second wife in property of her husband.

According to Buddhist Law the second wife acquires by marriage an one-third interest in the property brought by her husband to the marriage. Where the share of the husband before his second marriage in Lettatpwa property of his first marriage is one-half, his second wife acquires an one third interest in that one-half, that is to say, an one-sixth interest in the whole property. (*Dunkley J.*)

S. P. L. A. CHETTIAR FIRM vs. MA PU.
163 I.C. 614 = A.I.R. 1936 Rang. 262

Succession—Burden of proving acquisition of property during coverture.

A Burmese wife who claims certain property as having been acquired by her husband during coverture must establish satisfactorily that it was acquired after her marriage. (*Dunkley J.*)

S. P. L. A. CHETTIAR FIRM vs. MA PU.
163 I.C. 604 = A.I.R. 1936 Rang. 262

BURDEN OF PROOF.

Special plea by Purdhanashin lady that she did not understand nature of transaction entered into by her—Burden of establishing her case.

In a suit on a mortgage executed by husband and wife, the wife who was a purdhanashin lady alleged that she signed the document on being requested to do so by

Burden of Prof—(Contd.)

her husband, and did not understand the real contents of the document. *Held*, that the pleas raised by the wife were in the nature of special pleas resting on facts within the special knowledge of the wife. It was therefore incumbent on her to establish her case founded on the special pleas. (*Guho & Bartley JJ.*)

SURESH CH. SEN vs. SM. NARANI DASI.

A.I.R. 1936 Cal. 378

Onus of proof on whom lies, in suit and in appeal

The plaintiff must prove his case, but in an appeal where the defendant contends that the judgment of the trial court should be upset he is to show that the judgment is wrong. (*Lord Wright.*)

RICHARD THOROLD GRANT vs. AUSTRALIAN KNITTING MILLS LTD & ORS.

1935 O.W.N. 1327

BURMA RURAL SELF GOVERNMENT ACT. (IV OF 1921.)

Sec. 2 & 28—“Public market,” meaning of.

Under Sec. 2, of cl. (h) (ii), Burma Rural Self Government Act, a “public market” means any market belonging to a District Council, or constructed, repaired or maintained out of a District Fund, and does not include any land not vested in the District Council, or any building not belonging to the District Council or not constructed, repaired or maintained out of the District Fund. (*Dunkley J.*)

JAHOO GANI vs. U PO THAT,

A.I.R. 1936 Rang. 331 = 164 I.C. 141

Sec. 28 (1) (c)—Shops to which the provisions of the section applicable.

Cl. (c) of Sec. 28 (1), Burma Rural Self-Government Act, only gives the right, to levy fees for exposing goods for sale on roads or streets. Only temporary stalls established on a road or street itself come within its purview, and shops established in buildings built on private property, but

Burma Rural Self-government Act—(Contd.)

abutting on to a road or street do not come within the clause. (*Dunkley J.*)

JAHOO GANI vs. U PO THAT,

A.I.R. 1936 Rang. 331=164 I.C. 141

Sec. 79(1) (e)—Rule framed under the section—Chap. I, r. 34—application under r. 34 for declaring election of a chairman void, if lies.

The rules framed for the election of a chairman of the District Council under Sec. 79(1) (e) of the Burma Rural Self-Government Act do not provide for any questioning of the election of chairman by petition to the Court. Therefore an application made to the Court purporting to be made under r. 34 of Chap. I of the Rules framed under the Act, for declaring the election of a chairman of the District Council void is not maintainable. (*Moseley & Ba U. JJ.*)

GOVT. ADVOCATE, BURMA vs. U PO SHWE & ANR.

A.I.R. 1936 Rang. 110=161 I.C. 335

CALCUTTA HACKNEY CARRIAGE ACT, (I OF 1919.)

Sec 60—Act of 1891 extended to a certain town in 1913 and certain place appointed by Municipality as hackney carriage Stand—Act of 1919 repealing earlier Act, not extended—Old hackney carriage stand still maintained causing nuisance in 1933—such nuisance, if actionable.

Although the Hackney Carriage Act, 1891 may have been extended by notification to a particular district in 1913, and the local municipality may have then appointed a place as a hackney carriage stand under the power so conferred, still, if the Act of 1919 by which the earlier Act was wholly repealed has not been extended to such district, the local municipality has no statutory authority since the Act of 1919 to appoint any place as a hackney carriage stand, and therefore, if nuisance result in 1933 from the maintenance of the old stand, the municipality can claim no

Calcutta Hackney Carriage Act—(Contd.)

statutory indemnity from action. (*R. C. Mitter J.*)

NIRMAL CH. SANYAL & ANR. vs. MUNICIPAL COMMISSIONERS OF PATNA TOWN.

40 C.W.N. 1353=A.I.R. 1936 Cal. 797

CALCUTTA HIGH COURT APPELLATE SIDE RULES.

Chap IV, rr. 7 & 9—Petition, if must be supported by affidavit when facts stated matters of record, certified copy whereof filed.

Where all the facts stated in a petition are supported by the certified copy of the order-sheet which is attached to the petition, an affidavit in support of such facts is not necessary, 32 Cal. 146 & 8 C.L.J. 308 followed. (*R. C. Mitter J.*)

RAJBALLAV MONAL vs. RAJENDRA NARAIN MONDOL.

40 C.W.N. 1408

CALCUTTA HIGH COURT ORIGINAL SIDE RULES.

Chap. X, r. 36 (as amended in 1922)—Default relevant under the rule.

The default which it is proposed to consider under Chap. X, r. 36 of the Calcutta Original Side Rules is default in the conduct of the suit during the entire period between its institution and the date on which action is taken under the rule, not merely failure of the suit to appear in the prospective list within six months from the date of institution. But there can be no dismissal unless the failure to appear in the prospective list is continuing at the date which action is taken, the default for which the suit is liable to be dismissed being such continuing failure. 358 Cal. 736 affirmed. (*Lord Thankerton.*)

SRINIVAS PRASAD SINGH vs. KESAVA PRASAD SINGH & ORS.

63 I.A. 12=62 Cal. 662=40 C.W.N. 321=1936 A.L.J. 101=1936 A.W.R. 212=70 M.L.J. 94=1936 M.W.N. 327=43 M.L.W. 228=38 Bom. L.R. 146=159 I.C. 549=A.I.R. 1936 P.C. 9

Chap. X, r. 36 (as amended in 1922)—Proper ground for action—More suspicion of

Calcutta High Court Original Side Rules —(Contd.)

improper or vexatious conduct not warranted by record, if proper ground.

Although the right which every litigant has to have his case heard and disposed of must not be abused, even though the defendant does not complain of the plaintiff's delay, on the other hand, the Court is not entitled to deprive the litigant of his right except on clearly ascertained grounds, and to the exclusion of grounds which rest merely on suspicion. Suspicion of an object to harass the defendant which is not warranted by any material on the record is an unjustifiable and improper consideration to take into account in the judicial exercise of the discretionary power of dismissal under r. 36. R. 36 is conceived mainly in the public interest and not in the interest of the defendant who can usually force progress under r. 7. (*Lord Thankerton.*)

SRINIVAS PROSAD SINGH vs. KESAVA PROSAD & ORS.

63 I.A. 12=63 Cal. 662=40 C.W.N. 321=1936 A.Z.G. 101=1936 A.W.R. 202=70 M.L.J. 94=1936 M.W.N. 397=43 M.L.W. 228=38 Bom. L. R. 146=159 I. C. 549=A.I.R. 1936 P.C. 9

Ch. 26, r. 10 & Ch. 36, r. 77 (2)—*Sheriff's poundage—attachment of property before judgment by sheriff—bankruptcy of judgment debtor after seizure but before sale by sheriff—sheriff, if entitled to poundage in such cases—levy, meaning of—right to poundage in absence of levy.*

The word "levy" means the turning of goods into money and when there has been no levy, no poundage can be earned. Where the bankruptcy of the judgment debtor supervenes, after seizure but before sale by the sheriff, the sheriff must hand over the property to the Official Assignee and he is not entitled to any poundage. (*Mc Nair J.*)

GRAHAMS TRADING CO. (INDIA), LTD. vs. NARROTHAMDAS HARJEEBANDAS & ORS.

40 C.W.N. 1317

Chap. 36, r. 72—Review of taxation by a Judge.

Calcutta High Court Original Side Rules —(Contd.)

The question where there have been different cases set up by the parties and if so whether there were such decision as to justify representation by separate Counsel are not pure matters of the Taxing Master's discretion incapable of being reviewed by a Judge. (*Mc Nair J.*)

NIMAI CH. DE vs. BROJENDRA NATH MITRA & ORS.

40 C.W.N. 577

Chap 36, r. 82—Special Referee's Bill of costs—Time requisite for an effectual meeting.

The time requisite for an effectual meeting within the meaning of r. 32 of Chap. 36 of the Rules & Orders of the High Court, Original Side, should be computed on the basis of a four hour sitting, (*Derbysbhire, C. J & Costello J.*)

MANMATHA NATH CHATTERJEE vs. SARAT CH. MALLICK & ANR.

40 C.W.N. 1133

CALCUTTA MUNICIPAL ACT. (III OF 1923.)

Secs. 26 & 46(1) Plural voting, if an offence.

If an elector has been entered more than once in the electoral roll under different members, he does not commit an offence in exercising the right to which he has become entitled under Sec. 26, Calcutta Municipal Act, and voting in respect of each of such insertions. It cannot be stated with certainty that proviso (b) to Sec. 46 (1), does not justify the exercise of a second vote, even though the insertion of the name of the voter for the second time in the electoral roll was wrong. (*Mc Nair J.*)

NASIRUDDIN AHMED vs. HAJI MAHAMMED YUSUF.

63 Cal. 825=40 C.W.N. 741=165 I.C. 869

Sec. 46—Particulars of allegations made in plaint, if can be furnished in affidavit in reply after expiry of time for filing application.

Calcutta Municipal Act—(Contd.)

Sec. 46 of the Calcutta Municipal Act does not prevent petitioner who has filed his petition within the period specified in the section from stating in his affidavit in reply, after expiry of that period, any further particulars of the allegations made in the petition. (*McNair J.*)

NASIRUDDIN AHMED vs HAJI MAHAMMED YUSUF.

63 Cal. 825 = 40 C.W.N. 741 = 165 I.C. 489

Sec. 46—*Provision of 8 days time in the Section if applies to giving particulars by adding other instances of personation,*

The proviso in Sec. 46 of Calcutta Municipal Act, giving 8 days time within which to file the election petition, is intended to provide the person elected with an opportunity of meeting the charges at once and thus to enable the matter to be speedily determined, and substantiated to enable a fresh election to be held without delay. There is however nothing in the section which prevents an applicant, after such 8 days, from giving further particulars—by adding other instances of personation. In such cases the guiding principle in ordinary particulars which is to prevent the defence from being embarrassed and ensure a fair and effectual trial, should be made to apply. (*McNair J.*)

NASIRUDDIN AHMED vs HAJI MAHAMMAD YUSUF.

63 Cal. 825 = 40 C.W.N. 741 = 165 I.C. 489.

Sec. 127, cl. (a) & (b)—*Assessment of same building under both clauses, if permissible.*

For the purpose of Sec. 127, Calcutta Municipal Act 'building' includes a part of a building. When part of a building is used for residential purposes and part for letting purposes, the same building may be assessed under both cl. (a) & (b) of Sec. 127 of the Calcutta Municipal Act—such part as is used for letting purposes being assessed under cl. (a) and such part as is

Calcutta Municipal Act—(Contd.)

used for residential purposes being assessed under cl. (b). (*S. K. Ghosh & Guho JJ.*)

CORPORATION OF CALCUTTA vs. MOTI-CHAND CHOWDHURY & ORS.

40 C.W.N. 818.

Sec. 391—*License, if must be taken for cinema when police license, if must be taken.*

Sec. 394 of the Calcutta Municipal Act covers cinemas and the application of the section to cinemas is not excluded by the Cinematograph Act. Consequently for opening or keeping open a cinema within the limits to which the Calcutta Municipal Act applies, a license must be taken from the Corporation although a police license may have been taken. When such license is not taken and the Corporation prevents the opening of the cinema, it does not exceed its authority and is not liable for damages. (*M. C. Ghosh, J.*)

CORPORATION OF CALCUTTA vs. THE MONARCH BISCOPE CO.

40 C.W.N. 497 = 63 C.L. JI. = A.I.R. 1936 Cal. 145 = 162 I.C. 668.

Sec. 523 (1)—*Court of Small Causes or High Court which has jurisdiction to try suit within local jurisdiction, but above pecuniary jurisdiction of former—Division of jurisdiction between Courts of Small Causes inter se and Small Cause Court and High Court, principle of.*

The words "having local jurisdiction", in Sec. 523 (1) of the Calcutta Municipal Act, refer to the Court of Small Causes and the words "as the case may be" refer to pecuniary jurisdiction, the result being, that under the Section the division of jurisdiction as between the different Courts of Small Causes is local while that between the Court of Small Causes and the High Court is pecuniary. Consequently when a claim under the section amounts to a figure above the pecuniary jurisdiction of the Court of Small Causes, the High Court and not the Court of Small Causes has jurisdiction to entertain the suit, although the

Calcutta Municipal Act—(Contd.)

local jurisdiction may be with the latter.
(*Nasim Ali & Henderson JJ.*)

BHUIYAM BHASKAR CHANDRA MAHAPATRA *vs.* THE CORPORATION OF CALCUTTA.

40 C.W.N. 764

Rules in "Assessment" and Collection Manual, if have force of law.

The rules in the "Assessment and Collection Manual of the Corporation of Calcutta" have not the force of law and may be ignored if they are inconsistent with the provisions of the Calcutta Municipal Act. (*S. K. Ghose & Guha JJ.*)

CORPORATION OF CALCUTTA *vs.* MOTI-CHAND CHOWDHURY & ORS.

40 C.W.N. 818.

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1932)

Secs. 2(c) & 8(2)—Definition of "debt"—scope of.

The definition of "debt" in cl. (c) of Sec. 2, C. P. Debt Conciliation Act is wide enough to include any liability for a cash payment on account of net cash and compensation for equalisation of shares under a partition decree, and the decreeholder entitled to realise such amount due is a creditor. (*Pollock J.*)

PANNALAL *vs.* BAIJNATH & ORS.

A.I.R. 1936 Nag. 145 = 165 I.C. 412 (1).

Sec. 15(2)—Suit by creditor—dismissed debtor's application under Sec. 4.

The words "sues" in Sec. 15 (2) of the C. P. Debt Conciliation Act is used in a comprehensive sense so as to include the entire suit until the passing of the decree. Sec. 15 (2) therefore comes into operation not only when the certificate is granted before the institution of the suit, but also when it is granted during the pendency of the suit. (*Niyogi A. J. C.*)

SUKH LAL *vs.* DAMROO & ANR.

19 N.L.J. 24.

C. P. TENANCY ACT (XI OF 1898)

Secs. 46 & 47—Right of occupancy tenant to transfer his holding—Rights of heir in case of transfer by occupancy tenant.

Under Sec 46, C. P. Tenancy Act, the transfer by an occupancy tenant of his holding is restricted. Under Sec. 47 when an occupancy tenant does transfer his holding his heir is entitled to be put in possession by the Revenue Officer. The section creates no interest in the heir, under the general rule. (*Wort & Fazl Ali JJ.*)

S. M. DE SOUZA *vs.* SECY. OF STATE.

A.I.R. 1936 Pat. 542.

CENTRAL PROVINCE LAND REVENUE ACT (II OF 1917).

Secs. 73 & 80—Settlement officer allowing deduction or exception from rent—force of the decision.

A settlement officer has power to allow a reduction or exception from rent and his decision is binding on the landlord during the currency of the settlement. (*Pollock J.*)

KAMLUSAO *vs.* KISAN & ANR.

A.I.R. 1936 Nag. 221 = 164 I. C. 941.

Sec. 80—Section, if has retrospective operation,

Sec. 80 of the C. P. Land Revenue Act, 1917, which requires the defeated party to sue within one year cannot have a retrospective operation, and cannot apply to a person who is governed by the C. P. Land Revenue Act of 1881. (*Subhedar & Niyogi A. J. Cs.*)

YADGAR HUSSAIN *vs.* MOULANA M. E. R. & ANR.

31 N.L.R. 202.

Sec. 88(2)(c)—Proprietor—meaning of.

The word "proprietor" in Sec. 88 (2) (c) of the C. P. Land Revenue Act, cannot be taken to mean a recorded proprietor only but includes an unrecorded proprietor as well. (*Subhedar & Niyogi A. J. Cs.*)

YADGAR HUSSAIN *vs.* MOULANA M.E.R. & ANR.

31 N.L.R. 202 = A.I.R. 1936 Nag 71 = 163 I.C. 79.

Sec 16 (2) (1)—Effect of notification No. 1521-XII—suit for agricultural profits—limitation.

C. P. Land Revenue Act—(Contd.)

The effect of the notification No. 1521 XII dated 26.4.28 and notification No. 185 dated 15.9.27 is to make the agricultural year 1923-29 consist of 14 months from 1st April 1928 to 31st May 1929. A suit for agricultural profits in the year 1927-28 has therefore to be brought within 3 years from 1st April 1928 according to Sec. 160 of the C. P. Land Revenue Act, (*Pollock A. J. C.*)

MADHURNATH vs. JAILAL SAO & ORS.

31 N.L.R. 33=A.I.R. 1935 Nag. 244
=159 I.C. 950.

Secs. 187 & 189—Imperfect partition of Mahal—Lambardar, if ceases to be such,

Per Grille, J. C. and Gruer, A. J. C.—On an imperfect partition of a Mahal, a lambardar does not automatically cease to exercise his power when his proprietary interest in a Patti of that Mahal is lost. The Mahal continues to be the Mahal and does not lose its character as such on an imperfect partition into pattis, and the lambardar of the Mahal continues to be the lambardar until he is removed. A lambardar is appointed by Statute and is only removable by Statute. *Per Subhedar A. J. C.*—A person who has been appointed lambardar of a Mahal ceases to be a lambardar when the Mahal is imperfectly partitioned. The legislature obviously contemplated that while the appointment of a lambardar must be expressly made for each mahal or patti, it left the formal removal of a lambardar so appointed absolutely in the discretion of the appointing authority and did not cast upon it the duty of formally removing him whenever in the eye of law he ceases to function to such.

KESHO JAGANNATH SAGDEO vs. RAQJI GOPAL SAGDEO.

31 N.L.R. 132=A.I.R. 1936 Nag. 44
=161 I.C. 806.

Sec. 188 (2) (c)—Right of Lambardar to sue for commission.

A Lambardar becomes entitled to his commission when he has paid the land revenue and the fact that he is required

C. P. Land Revenue Act—(Contd.)

to render account within six months does not prevent him from suing for the recovery of the commission before the lapse of six months. (*Subhedar & Grille, J. C. S.*)

KESHO JAGANNATH SAGDEO vs. RAQJI GOPAL SAGDEO.

31 N.L.R. 132=A.I.R. 1936 Nag. 44
=161 I.C. 806.

CENTRAL PROVINCES LOCAL SELF GOVERNMENT ACT (IV OF 1920).

Secs. 4, 21, 36 & 79—Vice-Chairman of a Local Board, if a public officer within the meaning of Sec. 21 (10) of the Penal Code.

Having regard to the provisions contained in Secs. 4, 36 read with 21 and 79 of the C. P. Local Self Government Act, the Vice-Chairman of the Local Board must be deemed to be an officer whose duty it is to perform official duties enumerated in Sec. 21, para 10 of the Penal Code. (*Bose J.*)

ANNA CHAMPAT RAO DESHMUKH vs. EMPEROR.

19 N.L.J. 221.

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922).

Secs. 163 & 199—Health Officer, as Secretary of his Department, if can issue notice under his signature.

Rule 10 of the Municipal Rules and Bye laws framed under Sec. 25 & 27 of the C. P. Municipalities Act empowers the Health Officer in his own Department to perform the duties and exercise the powers of the Secretary. The rule is in no way *ultra-vires* or inconsistent with Sec. 168 of the Act. A notice under Sec. 199 of the Act under the signature of the Health Officer requiring a person to construct a pucca drain is not invalid by reason of the fact that the notice was not signed by the Health Officer in his capacity as Secretary of the Health Department. Any defect in form, would further be cured by Sec. 168 (4) of the Act. (*Gruer & Bose J.J.*)

LOCAL GOVERNMENT vs. GANPAT RAO VENKATRAO NAIK.

19 N.L.J. 192.

CENTRAL PROVINCES TENANCY ACT (XI) OF 1898)

Secs. 46(3) & (5)—Scope of the section

Sec. 46, sub sec. (5), C. P. Tenancy Act, does not determine the question of validity or otherwise of the transaction itself. For that purpose reference must be made to sub-sec. (3) which alone interdicts certain transfers. Sub-Sec. (5) merely shuts out the evidence which would furnish proof of the transfer, but does not enlarge the sphere of the prohibition. The registration or non-registration of the document does not affect the inherent character of the transfer which is to be judged by another provision. (*Sir Shadi Lal*)

PARASHURAM BALAJI DESHMUKH & ANR. vs. ASARAM & OTHERS.

I.L.R. 1936 Nag. 104=19 N.L.J. 228
=71 M.L.J. 856=41 C.W.N. 101=64
C.L.J. 301=17 Pat. L.T. 937=164 I.C.
345=A.I.R. 1936 P.C. 301.

Sec. 46 (3) & (5)—Registration of document embodying transfer which is partly valid and partly invalid—effect of.

A document embodying transfers of which some are valid, but others are invalid being prohibited by statute, if admitted to registration, cannot be treated as an unregistered document. The document would be inoperative in regard to the property, the transfer of which is prohibited, but so far as the remaining properties are concerned there is no law under which their transfer can be invalidated. (*Sir Shadi Lal*.)

PARASHURAM BALAJI DESHMUKH & ANR. vs. ASHRAM & OTHERS.

I.L.R. 1936 Nag. 104=19 N.L.J. 228
=A.I.R. 1936 P.C. 301=164 I.C. 345
=41 C.W.N. 101=64 C.L.J. 301 17
P.L.T. 937=71 M.L.J. 856.

Sec. 46(5)—Duty of Registering Officer under the Section.

Under Sec. 46 (5), Registration Act, the Registration Officer is not required to enter upon an enquiry as to whether a certain property sought to be transferred would or would not amount to an occupancy right. Such an enquiry is beyond his province.

C. P. Tenancy Act—(Contd.)

His function is to peruse the instrument and to see whether it purported to make a prohibited transfer, and if he thought *ex-facie* that the instrument did not embody such transfer, he is bound to admit it to registration. (*Sir Shadi Lal*.)

PARASHURAM BALAJI DESHMUKH & ANR. vs. ASARAM & OTHERS.

I.L.R. 1936 Nag. 104=19 N.L.J. 228
=A.I.R. 1936 P.C. 331=164 I.C. 345
=41 C.W.N. 101=64 C.L.J. 301=17
P.L.T. 937=71 M.L.J. 856.

Sec. 83—Decree for arrears of rent by Court other than first class Subjudge, if appealable.

A decree for rent passed by a Subordinate Judge who is not a Subordinate Judge of the first class, is appealable. (*Subhedar A. J. C.*)

ATEFAT ALI KHAN vs. RAM KRISHNA & ORS.

31 N.L.R. (Supp.) 15=180 I.C. 128
A.I.R. 1935 Nag. 257.

CERTIORARI

Circumstances in which writ of certiorari will be issued.

Whenever a body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the Court which is exercised by the issue of a writ of certiorari. But the rights of subject referred to above must be rights which can be legally enforced and not mere honours or precedence, claimed or recognised as a matter of courtsey or usage. (*Pandurang Row, J.*)

EMBERUMANAR JEER SWAMIGAL vs. BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENT, MADRAS & ORS.

71 M.L.J. 588=44 M.L.W. 539=1936
M.W.N. 954=A.I.R. 1936 Mad. 973.

Election set aside on the ground of improper votes having been received—result of election not materially affected by reception of the votes—interference by certiorari whether proper.

Certiorari—(Contd.)

An election having been set aside on the ground that the Polling Officer had wrongfully invalidated certain ballot papers and thereby disenfranchised a number of voters, the petitioner who had been returned by a majority of 114 votes applied for a writ of certiorari to quash the order of the Election Commissioner declaring the election invalid. It was found that even if the rejected votes had been duly admitted, the result of the election could not have been materially affected. *Held*, that the Election Commissioner having declared the election void without considering the very question upon which his jurisdiction to declare the election void depended, there was a proper case for interference by certiorari, and the Commissioner's order was liable to be quashed. (*Venkata Subba Row & Cornish JJ.*)

Y. MAHARAJESWARAPPA vs. S. RAM CH. ROW & ORS.

71 M.L.J. 199 = A.I.R. 1935 MAD. 669
= 44 M.L.W. 101 = 1936 M.W.N. 720
= 165 I.C. 433.

CESSE.

Claim for cess based on valuation roll, if may be questioned in Civil Court by showing that the Record-of-Rights on which valuation roll was based was incorrect.

When a Cess Valuation Roll has been prepared in accordance with the record-of-rights as it stood at the time, the tenant cannot question the said roll collaterally in a civil suit brought for rent and cess by showing that the record is wrong, for example, that it has recorded the land as forming different tenures, whereas they form a single tenure. (*Guho & Lodge JJ.*)

KAMESWAR SINGH vs. KULADA PRASAD SAHU.

40 C.W.N. 153 = 62 C.L.J. 303.

Valuation roll prepared on the basis of record-of-rights—entries in the Record of rights erroneous—liability of the tenants.

When a valuation roll has been prepared on the basis of record-of-rights, and part of the entries in the record-of-rights is found to be erroneous and incorrect, that fact

Cess—(Contd.)

does not render the valuation roll prepared under the Cess Act ultra vires. It is not open either to the landlord or to the tenants to question the valuation roll unless it was prepared without jurisdiction, and until and unless the valuation role is declared to be ultra vires by a competent court, the liability of the tenants as to payment of cess must remain, (*Guho & Lodge JJ.*)

KAMESWAR SING vs KULADA PRASAD SAHU.

40 C.W.N. 153 = 62 C.L.J. 303.

CHARGE.

Compromise decree creating charge in favour of a third person—Compromise deed not registered—Third party, if can enforce the charge.

Where the parties to a suit come to a compromise and the terms of the compromise are incorporated in the decree, a person who is not a party to the suit and who gets a maintenance allowance "under the compromise," for payment of which a charge is created over certain property, cannot enforce the charge unless the compromise deed is registered. (*Rachpal Singh J.*)

MT. TIJJO vs. CHIRANJI LAL.

1936 A.L.J. 288 = 1936 A.W.R. 588
= 161 I.C. 45 = A.I.R. 1936. All 621.

CHARITABLE & RELIGIOUS TRUSTS ACT (XIV OF 1920).

Sec. 3—Order under the section, if open to revision.

An order of the District Judge under Sec. 3 of the Charitable and Religious Trusts Act, is open to revision by the High Court under Sec. 115, C. P. Code and Sec. 44, Punjab Courts Act. (*Bhile J.*)

MUHAMMED YAR vs. KHALILUL RAHMAN.

17 Lah. 768 = 38 P.L.R. 900 = A.I.R.
1936 Lah. 695 = 165 I.C. 664 (1).

Sec. 3—Mosque built for the public by subscriptions, if a public trust.

A mosque built with funds collected from public subscriptions and used by the

Charitable & Religious Trusts Act—(Contd) Chotanagpur Tenancy Act—(Contd.)

Mahamedan public for offering prayers, is a public trust, and therefore an application is maintainable under Sec. 3 of the Charitable and Religious Trusts Act requiring certain information from the mutwali, and such an application should be decided on merits. (*Bhude J.*)

MUHAMMED YAR vs. KHALIL-UL RAHMAN.

17 Lah. 768=38 P.L.R. 900=A.I.R. 1936Lah. 695=165 I.C. 661 (1)

Sec. 3—Deed containing trust for public purpose and a trust for private purpose—Applicability of the section.

Section 3 of the Charitable and Religious Trusts Act, 1920 can be applied to a deed which contains more than one trust, one of which may be a trust for the public purpose of a charitable or religious nature and the other for a private purpose. (*Ganganath J.*)

NAGESWAR PROSAD SINGH vs. RAM SAWRUP SINGH & ANR.

1936 A.L.J. 546=1936 A.W.R. 420. 163=I.C. 234=A.I.R. 1936. All. 411

CHOTONAGPUR ENCUMBERED ESTATES ACT (VI OF 1876)

Sec. 12A—Application of the section—discretion of the Court.

The 3rd sub-section of Sec. 12A of the Chotonagpur Encumbered Estates Act renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. (*Lord Thankerton.*)

BINDESWARI CHANDRA SINGH vs. BAGESWARI CHARAN SINGH.

63 I.A. 53=15 Pat. 203=17 P.L.T. 28=40 C.W.N. 289=62 C.L.J. 521=1936 A.W.R. 84=1936 A.L.J. 104=70 M. L.J. 122=1936 M.W.N. 321=43 M.L.W. 159=38 Bom. L.R. 339=38 P.L.R. 325=1936 O.W.N. 127=A.I.R. 1936 P.C. 46=160 I.C. 68

CHOTANAGPUR TENANCY ACT VI (OF 1908.)

Sec. 6—Settlement for cultivation—planting orchard on land and gathering

fruits from existing orchards—distinction, if any.

There is no difference between taking settlement of land for the purpose of planting an orchard, which may be held to be cultivation, and taking settlement of a land upon which an orchard already exists, in other words, taking settlement for gathering all the fruits from an existing orchard. (*Wrot & Rowland JJ.*)

KAMAKHYA NARAIN SINGH vs. INDER MAN RAM SHAU.

A.I.R. 1936 Pat. 265.=162 I.C. 981

Sec. 11—Preliminary issue on point of limitation in rent suit decided in plaintiff's favour—defendant, if has a right of appeal.

The defendant in a rent suit having raised an objection that the suit was barred by the provisions of Sec. II, Chotonagpur Tenancy Act, the Court framed a preliminary issue on the point, and ultimately decided it in favour of the plaintiff. The defendant thereupon appealed from the said order to the Deputy Commissioner. *Held*, that no appeal lay from the order because a decision on such point in plaintiff's favour was not a decree declaring or determining the right of the parties conclusively. (*Saunders J.*)

RAM RACHHAYA SINGH & ORS. vs. DAMAR SINGH.

A.I.R. 1936 Pat. 356=161 I.C. 694.

Sec. 46—Mortgage beyond five years, if illegal,

There is nothing in the Chotonagpur Tenancy Act which provides that a mortgage by a ryot of his right in his holding for a period exceeding five years is illegal. (*Wrot J.*)

BALNATH PROSAD SINGH vs. MUNESWAR SINGH & ORS.

A.I.R. 1936 Pat. 63=160 I.C. 1066.

Sec. 74A—Provisions of the section if applicable to vacancy existing at the date of application.

Sec. 74A of the Chotonagpur Tenancy Act introduced by the amending act of 1920 empowers the filling up of a vacancy at

Chotanagpur Tenancy Act—(Contd.)

the date when the application is made, irrespective of whether it occurred before or after the provision came into force, provided the custom of headmanship exists at the date. (*Macpherson & Khaja Mohammed Noor JJ.*)

JAGDISH CH. DEO DHABAL DEB vs. SANKARSHAU BHUMJI.

15 Pat. 488 = 17 P.L.T. 445, = 162 J.C. 582.

Sec. 74A—Question of limitation in proceeding under the section, if can be challenged in a separate suit.

When a question of limitation is decided in a proceeding under Sec. 74A of the Chotanagpur Tenancy Act, that decision whether rightly or wrongly made, is, subject to appeal or revision, final between the parties, and cannot be gone into again in a subsequent suit between the same parties. (*Macpherson & Khaja Mohammed Noor J.*)

JAGDISH CH. DEO vs. SANKARSHAU BHUMJI.

15 Pat. 488 = 17 P.L.T. 445, = 162 J.C. 582.

Secs. 74A, 139 & 258—Deputy Commissioner appointing a person as village Headman without jurisdiction—suit in the Civil Court, if barred.

Sec. 74A, Sub-Sec. (5) or Sec. 139. cl. (b), does not bar a suit in the Civil Court where the appointment of the defendant as a village headman was made by the Deputy Commissioner without jurisdiction. (*Macpherson & Khaja Mohammed Noor JJ.*)

JAGDISH CH. DEO vs. SANKARSHAU BHUMJI.

15 Pat. 488 = 17 P.L.T. 445 = 162 J.C. 582.

Secs 46 & 47—Mortgage of raiyati holding, and sale of such holding in execution of mortgage decree, if permissible.

Although under Sec. 46, Chotanagpur Tenancy Act, the mortgage by a tenant of his raiyati holding in any portion of it, is permissible, yet by reason of the plain provisions of Sec. 47, that holding cannot be

Chotanagpur Tenancy Act.—(Contd.)

sold in execution of the mortgage^a decree. (*Macpherson & Fazl Ali JJ.*)

MST. JAMUNI vs. BHOLARAM.

15 Pat. 414 = 17 P.L.T. 650 = 165 J.C. 574 = A.I.R. 1936 Pat. 561.

See 47—Sale of raiyati holding in execution of mortgage decree—purchaser of holding at certificate sale for arrears of rent if can object to the sale.

Where the mortgagee of a portion of a raiyati holding proceeded to sell it in execution of his mortgage decree, and thereupon a person who had in the meantime purchased the entire holding at a certificate sale on the ground that Sec. 47, Chotanagpur Tenancy Act prohibited such a sale, held, that such person could not be said to be a representative of the judgment-debtor and therefore had no *locus standi* to make the objection. (*Macpherson & Fazl Ali JJ.*)

MST. JAMUNI vs. BHOLARAM.

15 Pat. 414 = 17 P.L.T. 650, = 165 J.C. 574 = A.I.R. 1936 Pat. 561.

Secs 208 & 212—Sale of the holding for arrears of rent—decretal amount deposited after statutory period—sale, if can be set aside.

Where the sale of a holding for arrears of rent under Sec. 208, Chotanagpur Tenancy Act, was set aside by the Court, and it appeared that the deposit of the decretal amount contemplated by Sec. 212 of the Act was made after the statutory period, held that the Court had no jurisdiction to accept the deposit, and therefore the order setting aside the sale was without jurisdiction and could be challenged by a suit. (*Agarwalla & Varma JJ.*)

JAINANDAN RAM TEWRAI vs. PURIA URAON

15 Pat. 698 = 17 P.L.T. 673, = 165 J.C. 812 = A.I.R. 1936 Pat. 590.

Secs. 214 (b) & 258—Right of Civil Court to set aside decree passed without jurisdiction, if can be barred.

Sec. 214 (b) of the Chotanagpur Tenancy Act does not constitute a bar to the

Chotanagpur Tenancy Act—(Contd.)

inherent right of the Civil Court to set aside a decree passed without jurisdiction. This right is also expressly recognised by Sec. 258 of the Act. (*C. Agarwalla & Madan JJ*)

JAINANDAN RAM TEWARI vs. PURAI ORAON.

15 Pat, 698=17 PL.T, 673=165 I.C, 812=A.I.R, 1336 Pat. 590.

CIVIL PROCEDURE CODE (V OF 1908)

Secs. 2 (2), 47 & 48—*Application for execution—order allowing amendment of petition made after expiry of twelve years—order, if appealable.*

A decreeholder after several unsuccessful attempts to execute his decree, finally filed an execution petition asking for the arrest of the judgment debtor and attachment of his movable properties. Later he applied for leave to amend his petition, by including a prayer for the attachment of the judgment-debtor's immoveable property. This application was made after the expiry of the twelve years period prescribed by Sec. 48 C. P. Code. The executing Court however allowed the decreeholder to make the amendment sought for. *Held*, that the order allowing the amendment was incidental and and interlocutory and not final, and therefore the appeal to the lower court was incompetent. *Held*, however, that the order of the executing Court allowing the amendment was not justified and was liable to be set aside in revision. (*Venkatasubba Rao, J.*)

VALUTHA NDI BEERANKUTTY vs. AMATH MAMMU & ORS.

71 M.L.J. 256

Sec. 2 (9) & (11)—*Registered kabuliya to cultivate malikmakbuza land for fixed period for a certain sum annually—tenancy, if created.*

Where the defendants executed a registered kabuliya to plaintiff (*Malikmakbuza holder*) to cultivate plaintiff's land for a particular period agreeing to pay a certain sum every year in return; *held*, that the defendants were thereby constituted tenants of the plaintiff, and the money stipulated to be paid by them annually to the

Civil Procedure Code—(Contd.)

plaintiff was "rent" within the meaning of the Act. (*Vivian Bose J.*)

BABURAO BHIKARI vs. SANDU & ORS.

I.L.R. 1636 Nag. 5=165 I.C. 122=A.I.R. 1936 Nag. 80.

Sec. 2 (15) & Or. 3, r. 1—*Recognised agent—Right to argue and plead a case.*

Or. 3, r. 1, C. P. Code provides that any appearance, application or act in any Court may be made or done by a recognised agent. The rule means no more than that he can appear, make applications and take such steps as may be necessary in course of the litigation for the purpose of the case of his principal being properly led before the Court. It cannot justify a recognised agent being allowed to argue and plead. (*Srivastava & Nanavutty JJ.*)

JIVAN LALL & ORS. vs. PROPERTY OF RAMRATAN & ORS.

1936 O.W.N. 351=161 I.C. 538 (1)=A.I.R. 1936 Oudh, 261.

Secs. 2 (17) (b) & 80 *Dispute between two co-mutwalis about profits—District judge placing one mutwali in management—suit by other mutwali for his share of profits—notice under sec. 80, if necessary.*

Where a dispute arises between two co-mutwalis about the profits from the wakf property, and on the matter coming up before the District Judge, he arranges with their consent that one of them should take charge of the property, manage it, collect rents and after making certain deductions divide the profits themselves, the mutwallis put in charge of the management cannot be said to be a public officer within the meaning of sec. 2 (17) (b), C. P. Code. In a suit by the other mutwali for his share of the profits, it is therefore not necessary for him to give any notice to the defendant mutwali under Sec. 80 C. P. Code. (*Allsop J.*)

ABDUL RAB vs. MOHAMMED HASAN KHAN.

1936 A.W.R. 1012=1936 A.L.J. 1112, 165 I.C. 681=A.I.R. 1936 All. 801.

C. P. Code—(Contd.)**Sec. 4—Insolvency Act, if governed by C. P. Code..**

The Provincial Insolvency Act is a special law, and in the absence of any specific provision to the contrary the Code of Civil Procedure cannot limit or otherwise affect the provisions of the Insolvency Act. (*Collister & Bajpai J.*)

WALI MUHAMMED vs. HINGAN LAL.

58 All. 639=1936 A.L.J. 9=1936 A.W.R. 61=A.I.R. 1936 All. 80=161 I.C. 311.

Sec. 11—Circumstances under which decision in former suit may operate as res judicata in subsequent suit.

In order that a decision in a former suit may operate as res judicata in subsequent suit it is necessary that the Court which tried the former suit was a Court competent to try the subsequent suit. Mere competency to try the issue raised in the subsequent suit is not enough. Further, it is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which that suit was ultimately decided on appeal, and in order to determine whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of the Court at the date of the former suit and not its jurisdiction at the date of the subsequent suit. (*Harries J.*)

KALYAN DAS vs. SUDERSHAN LAL. & ORS.

1936 A.W.R. 1091

Sec. 11—Application for execution—adjustment pleaded—application dismissed not being pressed—fresh application—question as to truth of adjustment, if can be raised.

In an application for execution of a decree, the judgment debtor pleaded that a smaller amount than that claimed, was due by reason of an adjustment. Subsequently the application for execution not

C. P. Code—(Contd.)

having been pressed, the Court dismissed the same with the remark "not pressed". Subsequently, the decree-holders again applied for execution. The judgment-debtor contended that the question as to the truth of the adjustment pleaded by him could not be gone into by the Court as it had been decided by the order on the previous application. *Held*, that the rule of res judicata did not apply to the case as the question of adjustment had not been decided either expressly or impliedly in the previous application for execution. (*Pandrong Row. J.*)

LACHIRAM SANTOKHCHAND AMMECHAND FIRM vs. TARACHAND JAYRUPJI FIRM.

71 M.L.J. 490=1936 M.W.N. 810=44 M.L.W. 561.

Sec. 11—Decision when may operate as res judicata as between co-defendants.

In order that a decision may operate as res judicata as between co-defendants, three conditions are requisite :- (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. Where the question of liability of the defendants inter se has not been required to be decided in a suit, the judgment given in that suit cannot operate as res judicata in a subsequent suit between the co-defendants. (*Nanavutty & Zia-ul Hassan JJ.*)

VIGAR ALI BEG vs. MOHAMMED SRODAT ALI KHAN & ORS.

1936 O.W.N. 982.

Sec. 11.—Parties not litigating under the same title—plea of res-judicata, if available.

Where the parties in a suit are not litigating under the same title under which they litigated in the former suit, the plea of res judicata cannot be availed of. (*Srivastava A. C. J. & Smith J.*)

GUR DIN SAH vs. BADRI & ORS.

1936 O.W.N. 1003=164 I.C. 1003.

C. P. Code—(Contd.)

Sec 11. Judgment obtained by fraud or collusion—Sec. 11, if applicable.

It is always open to a party to show that a judgment against him was obtained by fraud or collusion or that there was want of jurisdiction and in such cases Sec. 11, C. P. Code, would not apply. (*Sulaiman C. J. & Bennet J.*)

MST. PARBATI vs. GAJRAJ SINGH.

1936 A.W.R. 1009=1936 A.L.J. 1162.

Sec. 11—Competency of Court to try suit—change in valuation due to rise in market value of properties involved, if can be taken into account.

In determining the question of competency for the purpose of Sec. 11, C. P. Code, the court need not take into account any change in valuation resulting from a mere rise in the market value of the properties involved. If the property concerned in the two suits are the same, the fact that fifty years ago they were worth only an amount which would have brought a suit relating to them within the jurisdiction of a particular Court is no reason for holding a pronouncement of that Court in respect of title there-to not final merely because according to the present day market value the same properties are worth more than the limit of the pecuniary jurisdiction of that Court. (*Varadachariar & Mockett JJ.*)

DURJATI SUBBAYYA vs. ANANTARAJU NAGAYYAR & ORS.

71 M.L.J. 619.

Sec. 11—Principle of constructive res judicata, if applicable to execution proceedings.

The principle of constructive res-judicata is part of the general principle of res-judicata and is therefore applicable to execution proceedings also. (*Vivian Bose J.*)

MT. LAXMIBAI vs. SEWAKRAM.

I.L.R. 1936 Nag. 124.

Sec. 11—Question of title decided by Insolvency Court—decision, if operates as res judicata between the parties.

C. P. Code (Contd.)

Where a question regarding title to certain property had been decided by the Insolvency Court at the instance of a person who submits to it, the decision operates as res-judicata where the same question is raised in a subsequent suit by the same person seeking a declaration that the property belonged to the insolvent. 59 Cal. 1135 & 51 All 550 relied on. (*Vivian Bose J.*)

KUSHABYBAI vs. BAIKAKHU.

I.L.R. 1936 Nag. 28.

Sec. 11—Objections to award decided in arbitration proceedings—matter, if can be raised again in separate suit.

Where objections have been preferred during arbitration proceedings and have been disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit. (*Abdul Raschid & Addison JJ.*)

DAMODAR DASS & SONS LTD. vs. L. BASHASUWAR NATH & ORS.

A.I.R. 1936 Lah. 865.

Sec. 11—Suit for rent against defendant alleged to be for possession of the land—suit dismissed—subsequent suit for or in the alternative for assessment of fair rent, if maintainable.

The plaintiffs had in a previous suit claimed rent from the defendant on the allegation that the plaintiffs had a three annas odd interest in a certain mahal and that the lands which the defendants were in possession of had fallen entirely within their path. That suit having been dismissed on the ground that the plaintiffs had failed to establish that the land for which the plaintiffs were claiming ground rent had fallen entirely within their path, the plaintiffs brought another action for recovery of rent claiming that they had a separate path and the land was clearly within that path and that the defendant were in possession. *Held* that the latter suit was barred by res judicata. (*Wort J.*)

JAI NARAYAN LAL & ORS. KASHI LAL & ANR.

163 J.C. 136.

C. P. Code—(Contd.)

Sec. 11—Suit dismissed as premature—second suit, if barred.

In order to create an effective bar under the rule of *res-judicata*, a suit must have been finally heard and decided. A suit dismissed on the ground that it is premature cannot be said to have been so heard and decided. (*Din Mohammed J.*)

SHAM SUNDAR vs. CHANDU LAL & ORS.
38 P.L.R. 126=A.I.R. 1935 Lah. 994.

Sec. 11—Scope of the section.

Sec. 11 of the C. P. Code is exhaustive in respect of cases falling within its terms, and with regard to such cases the Court is not entitled to travel outside the section and apply general principles (*Mukherjee & S. K. Ghosh JJ.*)

SECUNDER ALI MIRDHA & ORS. vs.
SUDORUDDIN BHUIYA & ORS.

40 C.W.N. 174.

Sec. 11—Scope of the section.

Sec. 11, C. Code is not exhaustive of the law of *res-judicata* and the general principles underlying the rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not in terms apply; but as regards matters specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the conditions laid down by the legislature and have no power to ignore the express provisions of the statute in order to give effect to general principles (*Tekchand J.*)

LAHORI SINGH vs. OFFICIAL RECEIVER,
SIALKOT.

38 P.L.R. 757=163 I.C. 520.

Sec. 11—Doctrine of *res-judicata*—applicability to execution proceedings.

The doctrine of *res-judicata* applicable to execution proceedings does not rest on Sec. 11, C. P. Code, and distinctions are sometimes made between positive decisions and mere dismissals for default. Where there has been no dismissal for default,

C. P. Code—(Contd.)

but on the contrary, the question whether A was not the representative of B which was directly raised by the respondent, was dealt with by the Court and decided adversely to the respondent, it is impossible to ignore the force of that decision, whether right or wrong as *res-judicata* on general principles. 51 Cal. 548 & 56 All. 537 distinguished. (*Wort A. C. J. & Dhavle J.*)

KHARTAR SHAH vs. SYAM LALL.

163 I.C. 38=A.I.R. 1936 Pat. 616.

Sec. 11—Rule of *res-judicata*, if applicable to proceedings in insolvency.

The proceedings before an insolvency court are not a "suit" within the meaning of Sec. 11, C. P. Code. Therefore the technical limitation laid down in that section cannot be taken into account in such proceedings, and the general principles underlying the rule only are to be invoked. (*Tekchand J.*)

LAHORI SINGH vs. OFFICIAL RECEIVER,
SIALKOT.

38 P.L.R. 757=163 I.C. 520.

Sec. 11—Principles of *res-judicata*—trial of issue or suit when barred.

In order that the trial of an issue may be barred under Sec. 11 of the C. P. Code by reason of such issue having been decided in a previous suit, it is necessary that the previous suit must have been tried and the issue decided by a Court which would have jurisdiction to entertain the subsequent suit. (*Mukherjee & S. K. Ghose JJ.*)

SECUNDER ALI MIRDHA & ORS. vs.
SUDORUDDIN BHUIYA & ORS.

40 C.W.N. 174.

Sec. 11—Decision obtained by fraud, if can operate as *res-judicata*.

The decision in a previous suit which was obtained by means of fraud cannot operate as *res-judicata* in a subsequent suit. (*Thom & Iqbal Ahmed J.*)

GOPAL DAS vs. SRI THAKURJI.

A.I.R. 1936 Al. 422.

C. P. Code—(Contd.)

Sec. 11—Question of *res judicata* not raised by pleadings or in issues—appellate Court, if can decline to go into it.

The appellate Court can rightly decline to allow the appellant to go into the question of *res judicata* on the ground that it had not been properly raised by the pleadings or in the issues. (*Lord Thankerton*)

JAGADISH CH. DEO DHABAL vs. GOUR HARI MAHATA.

1936 A.W.R. 717=1936 O.W.N. 669=
44 M.L.W. 446=38 Bom. L.R. 1128=
A.I.R. 1936 P.C. 258 (P.C.)=164 I.C.
17.

Sec.—11 Decision in suit by widow for protection of her own rights if operates, as *res-judicata* in a suit by reversioner.

A decision in a suit by a widow or a limited owner in respect of and for the protection of her own rights in certain property bars a subsequent suit by reversioners in respect of that property even though such a suit may not be of a representative character. 38 Mad 406 & 46 All 831 followed. (*Thom & Iqbal Ahmed JJ.*)

GOPAL DAS vs. SRI THAKURJI.

A.I.R. 1936 All. 422.

Sec. 11—Decision against persons in their personal capacity, if can bar a subsequent suit against the same persons in their representative capacity.

The decision in a suit for possession and management of an estate against certain persons in their personal capacity cannot operate as *res-judicata* so as to bar a subsequent suit against the same persons in their position as Shebaites or managers and in respect of the property of the idol. 54 Cal. 770 followed 32 Cal 129 distinguished. (*Thom & Iqbal Ahmed JJ.*)

GOPAL DAS vs. SRI THAKURJI.

A.I.R. 1936 All. 422.

Sec. 11—Decision in representative suit in respect of public or private right, when binding in subsequent litigation.

A man may litigate bona fide in respect of a public or private right claiming it in

C. P. Code—(Contd.)

common for himself and others, and by virtue of Sec. 11, C.P. Code, bind all persons interested in such right by the finding arrived at in his suit. In such cases it may not be necessary even to name the persons expressly in the suit. Or, on the other hand, under Or. 1, r. 8, C. P. Code, he may obtain the leave of the Court to sue or be sued on behalf of or for the benefit of all persons so interested. In these circumstances he has to observe all the formalities laid down in the section, and if he fails to do so, persons other than himself will not be bound by any decision arrived at in that suit. (*Addison A, C. J. & Din Mohammed J*)

BISHEN SINGH & ORS. vs. BAKHSHISH SINGH & ORS.

A.I.R. 1936 Lah. 13=38 P.L.R. 787.

Sec. 11—Suit in representative character conducted without negligence, disposed of under Or. 17. R. 3—Decision, if operates as *res-judicata*.

When persons litigate bona fide in respect of a public or private right claimed in common for themselves, and others, all persons interested in such right shall, for the purpose of the section, be deemed to be claiming under the persons so litigating. So when a suit of a representative character conducted without negligence, is disposed of under Or. 17, r. 3, C. P. Code, it must be taken to have been decided on merits. Such decision will therefore fall within the scope of Sec. 11 C. P. Code. (*Bhide J.*)

NILA vs. PUNUN.

38 P.L.R. 809=A.I.R. 1936 Lah. 385=
165 I.C. 808.

Sec. 11—Decision of the Court regarding the applicability of a provision of law in previous suit, how far operates as *res judicata*.

The decision of the Court in a previous suit to the effect that a certain provision of law is not applicable to a certain transaction operates as *res judicata*, and the issues as to its applicability cannot be tried anew in view of the express prohibition

C. P. Code—(Contd.)

contained in Sec. 11 of the C. P. Code. 56 Cal. 723 distinguished. (*Lord Thankerton.*)

BINDESWARI CHARAN SINGH vs. BAGESARI SINGH.

63 I.A. 53=15 Pat. 203=40 C.W.N. 289=17 P.L.T. 25=1936 A.W.R. 84=1936 O.W.N. 127=A.I.R. 1936 P.C. 46=1936 A.L.J. 104=38 Bom. L.R. 339=62 C.L.J. 521=38 P.L.R. 325=1936 M.W.N. 321=43 M.L.W. 159=70 M.L.J. 122

Sec. 11—*Decision in a suit becoming final during the pendency of proceedings in the appellate Court in another—rule of res judicata, if applicable.*

There is nothing to exclude from the operation of the rule of res judicata judgments coming into existence during the pendency of proceedings by way of appeal or revision, if such judgments are allowed to become final. 33 Cal. 1101 followed; 29 Mad. 333 distinguished. (*Varadachariar J.*)

RANGACHARIAR vs. J. RANGASWAMI IYENGAR.

58 Mad. 777=70 M.L.J. 223=161 I.C. 219 (1)=1936 M.W.N. 243=43 M.L.W. 189=A.I.R. 1936 Mad. 190.

Sec. 11—*Previous suit comprising part of subject matter of subsequent suit—trial in respect of such part when barred.*

So far as a trial of a suit is concerned if a part of the subject matter of a subsequent suit had been the subject matter of a previous suit, the trial in respect of such part will be barred even though the previous suit was tried by a Court which had no jurisdiction to try the subsequent suit, if the other requirements of Sec. 11 of the C. P. Code are present. Or, if it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. (*Mukherjee & S. K. Ghosh JJ.*)

SECUNDER ALI MIRDHA vs. SADAR- UDDIN BHUNIYA.

40 C.W.N. 174.

C. P. Code—(Contd.)

Sec. 11—*Suit for rent in respect of land alleged to be within plaintiff's patti dismissed—subsequent suit claiming rent or alternatively for assessment of fair rent, if barred.*

The plaintiff sued for recovery of rent in respect of land alleged by him to be in his patti. He could not prove his allegation, and the suit was dismissed. He thereupon brought another suit claiming rent, or alternatively for assessment of fair rent in respect of the same land which he claimed to be within his separate patti.

Held, that the second suit was barred by res judicata. (*Wort J.*)

JAI NARAIN LAL & ORS. vs. KASHILAL.

17 P.L.T. 715.

Sec. 11—*Two suits tried together and one judgment delivered—appeal in one suit—finding of trial Court, whether res judicata in appeal.*

When two suits involving common issues are disposed of by one judgment, and an appeal is filed against the decree in the other, the matter decided in the latter suit does not become *res judicata* so as to bar its re-agitation in the appeal. (*Mukherjee & S. K. Ghosh JJ.*)

BAHADUR SINGH SINGHER vs. JYOTI- RUPA DEBI.

40 C.W.N. 1176.

Sec. 11—*Suit for redemption decreed—amount not paid—transfer of interest of mortgagor—suit for redemption by transferee if barred.*

Where the mortgagors brought suits for redemption against the mortgagees and the suits were decreed and a time was fixed for deposit of the mortgage dues, which however were not paid, and subsequently certain persons on whom the interests of the mortgagors in the mortgaged properties had devolved again brought suits claiming a right of redemption, *held*, that no final decree having been passed in the previous suit, the right of redemption had not been extinguished and therefore the subsequent

C. P. Code—(Contd.)

suit for redemption was not barred. (*Agarwalla & Rowland JJ.*)

JOTI LAL SHAH vs. SHEODHAYAN SHAH

15 Pat. 607 = A.I.R. 1936 Pat. 420 = 17 P.L.T. 564 = 163 I.C. 908.

Sec. 11.—*Suit for declaration of right to mohuntship—defendant contesting suit but not claiming the endowment properties, if debarred from such claim in a separate suit.*

The plaintiff sued for a declaration of his title to the office of the Mohunt of an *Asthal* and for possession of the properties of the *Asthal*. Objection was taken that the suit was barred by *res judicata* as in a previous suit, in which the right to hold the office of Mohunt was in issue, the plaintiff who figured as a defendant, did not put forward any claim to the properties appurtenant to the *Asthal*. Held, that the rule of *res judicata* did not apply, and the suit was not barred. (*Mukherjee & S. K. Ghose JJ.*)

GOVINDA RAMANUJ DAS MAHANTA vs. MAHANTA RAM CHARAN RAMMANUJ DAS.

63 Cal. 325 = 62 C.L.J. 153 = 164 I.C. 33.

Sec. 11.—*Judgment-debtor objecting to execution promising to pay decretal sum on fixed date and agreeing to objection being dismissed on default—Decretal amount not paid and objection dismissed—same objection if can be taken in subsequent application.*

A judgment-debtor who had filed an objection to the execution of the decree against him under Sec. 60(i)(e), C. P. Code, promised to pay up the decretal amount by a certain date, and agreed that if he failed to do so, his objection might be dismissed. On his having failed to pay according to the agreement, his objection was dismissed. Subsequently, he filed another application under Sec. 60(i)(e) taking similar objections. Held, that as the previous application under Sec. 60(i)(e) had not been heard and decided, his second application was not

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barred by the principles of *res judicata*. (*Agha Haidar J.*)

RAMCHAND vs. CO-OPERATIVE SOCIETY OF KHARAR & ANR.

38 P.L.R. 691 = A.I.R. 1936 Lah. 930.

Sec. 11. Expl. IV.—*Rule of res judicata, if applicable to pro forma defendant.*

The decision on an issue in a suit is not *res judicata* against a *pro forma* defendant against whom no relief is claimed and between whom and the plaintiff or the other defendants there is no issue or cross issue. (*R. C. Mitter J.*)

RAKHAL DAS RAY & ORS. vs. HARIDAS SARKAR & ORS.

40 C.W.N. 1208 = 64 C.L.J. 3.

Sec. 11, Expl. 4.—*Decision in a previous ex parte rent suit, if operates as res judicata in subsequent suit for rent.*

The principle of Sec. 11, C. P. Code, applies by reason of the explanation which extends it to cases in which a matter which ought to have been raised as an issue will be treated as if it had been raised and decided against the party who ought to have raised it. As between a landlord and his tenant, the question of the relationship of landlord and tenant is a matter that necessarily arises in a rent suit and must be considered to have been decided in favour of the landlord whenever an *ex parte* decree is obtained by him against his tenant. Therefore an *ex parte* decree in a previous rent suit operates as *res judicata* in the subsequent suit for rent between them and the question of relationship of landlord and tenant is concluded. (*James & Rowland JJ.*)

PIRTHI SINGH vs. RAMSARAN MAHTO.

17 P.L.T. 633 = 165 I.C. 623 = A.I.R. 1936 Pat. 556.

Sec. 11 Expl. 4.—*Representatives of judgment-debtors if entitled to raise objection which could have been but was not raised by the judgment debtors in previous execution proceedings—Applicability of the section to execution proceedings.*

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Under the ordinary rules of Res-judicata execution proceedings are equally affected by the principles governing the rule. In an execution case a notice was served on the judgment-debtor that the decree-holder was merely a benamdar, but no objection was raised by him. On his death his representatives objected to the execution of the decree by the decree-holder assignee, *held*, that they are bound by the rules of Res-judicata and therefore estopped from raising the objection not raised by their predecessors. 6 All. 269 referred; 60 Cal. 1181 distinguished. (*Mosely & Mackney JJ.*)

K. M. ESDOF vs. HAMIDA BIBI.

A.I.R. 1936. Rang. 218=163 I.C. 671.

Secs. 11, Expl. V—Application for personal decree, nature of—Effect of refusal to grant leave—Fresh application if barred.

An application under Or. 34, R. 6 is not an application for execution, but a substantive original application for a new decree in the suit. The procedure applying to the application would be governed by Sec. 141, C. P. Code. Therefore, where a definite application had been made for a decree under Or. 34, r. 6, C. P. Code, and no prayer was granted by the Court for passing a personal decree, the provisions of Expl. 5 to Sec. 11, C. P. Code would apply, with the result that the relief which was not expressly granted shall be deemed to have been refused. (*Agha Haidar J.*)

DEGRAJ vs. FAZAL KARIM.

38 P.L.R. 700=A.I.R. 1936 Lah. 388=163 I.C. 119.

Sec. 13(a)—Court of competent jurisdiction, if means competent by the Territorial Law or competent under Private International Law.

A question under Sec. 13A of the C. P. Code, as to whether the foreign Court was a court of competent jurisdiction must be determined in regard to personal action not by the territorial law of the Foreign State

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but by the rules of Private International Law. (*R. C. Mitra J.*)

CHOREMAL BALCHAND vs. KASTURI CHAND SERAOJI.

63 Cal. 1033=40 C.W.N. 591=63 C.L.J. 175.

Sec. 20—Place of suit for money due on contract, if may be Court within whose jurisdiction creditor resides where no place for payment specified—suit, if may be brought in Court within whose jurisdiction contract to be performed.

The principle of English Common Law that the absence of a place of payment specified either expressly or by implication in the contract, the debtor must seek out the creditor provided the latter resides within the realm applies in India under the Civil Procedure Code. Consequently, in such a case the creditor's residence must be taken to be the place where the payment is to be made and therefore a suit may be brought in the Court within the local limits of which such residence is situate, as a suit on a contract can be brought in India in the Court which has territorial jurisdiction over the place where the contract has to be performed. (*R. C. Mitra J.*)

TULSIMONI BIBI vs. ABDUL LATIF MIA.

40 C.W.N. 392.

Sec. 21—Decree by Court hearing no jurisdiction over subject matter of action—failure to object to gives jurisdiction

It is an established principle of law that in a case which the Court is competent to try, if the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure, which if objected to at the time would have led to the dismissal of the suit. Sec. 21, C. P. Code applies to such a case, but that section has no applicability to a case in which a Court which has no jurisdiction over the subject matter of the action passes a decree which is wholly void, and the maxim applies that

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consent cannot give jurisdiction. (*Subhedar, Neogi & Staples A. J. Cs.*)

MURLIDHAR SRINIVAS vs. GORAKH-RAM SADIHURAM.

31 N.L.R. (Supp.) 57 = 161 I.C. 877 = A.I.R. 1936 Nag. 1.

Sec. 24—Requirements of the section.

All that Sec. 24, C. P. Code requires is that the suit should be pending in a Subordinate Court which had jurisdiction at the time the suit was filed. If a suit of the valuation of Rs. 2,500 is filed in the Court of Munsiff having jurisdiction to try suits up to the value of Rs. 5,000 and subsequently that Munsiff is transferred and is succeeded by a Munsiff having jurisdiction only up to Rs. 2,000 the District Judge can transfer the suit under Sec. 24, from the Court of the Munsiff to another Court. (*Allsop & Ganga nath JJ.*)

BECHAN MISIR vs. MARKANDE MISIR.

1936 A.W.R. 214 = 1936 A.L.J. 452 = A.I.R. 1936 All. 335 = 162 I.C. 903.

Sec. 24—Three suits decided by one judgment—two appeals filed before District Judge and one before High Court—Application to transfer appeals to High Court, if maintainable.

Three suits were heard together by consent of the parties and disposed of in one judgment. Separate appeals were filed, two before the District Judge and one before the High Court. An application was made for the transfer of the appeals filed before the District Judge to the High Court for being heard along with the appeal filed in the High Court. Held, that although many of the grounds in the appeals were the same, one of the grounds having been subsequently raised in the appeal before the District Judge, the appeals ought not to be heard together and moreover as there can be no great hardship to the parties by allowing the appeals to be disposed where they had been filed, it was not necessary to transfer the appeal. (*Verma J.*)

SHIVA PRASAD SINGH vs. RAMJAS AGARWALLA.

A.I.R. 1936 Pat. 345 = 163 I.C. 962.

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Sec. 24 (2)—Suit cognisable by a Munsiff on the small Cause Court Side transferred to Bench of Honorary Munsiff—retransferred to Additional Munsiff—Additional Munsiff, if to be deemed to be Court of Small Causes.

A suit cognisable by a Munsiff on the Small Cause Court Side of his jurisdiction was transferred to a Bench of Honorary Munsiffs. Subsequently the case was transferred to an Additional Munsiff, who was not invested with Small Cause Court powers. Held, that when the suit was transferred to the Bench of Honorary Munsiffs, it became subject to the provisions of the U. P. Honorary Munsiffs Act, 1896, and in view of the proviso to Sec. 8(2) of that Act, which expressly excludes the application of Sec. 24(4), C. P. Code, the Bench of Honorary Munsiffs could not be deemed to be a Court of Small Causes. When therefore the suit was transferred from the Court of the Honorary Munsiffs to that of the Additional Munsiff, the latter could not acquire the jurisdiction of a Court of Small Causes in respect of this suit by virtue of Sec. 24(4), C. P. Code, which did not in terms apply, the transfer not being from a Court of Small Causes. Consequently, the decision of the Additional Munsiff was appealable. (*Niamatullah J.*)

MUNIRAM vs. ALI HUSSAIN.

57 All. 957.

Sec. 34—Interest pendente-lite, if can be claimed in a money suit.

In money suits, when the suit has been instituted, the question of interest for the period subsequent to the institution of the suit passes from the domain of contract into that of judgment. The plaintiff cannot, as a matter of right, claim that he is entitled to such interest. There is no hard and fast rule that interest *pendente-lite* must be allowed in every case. Every case has to be decided on its merits. (*Khawja Mohamad Noor & Varma JJ.*)

APURBA KRISHNA MITRA vs. RAM-BABADUR.

161 I.C. 862 = A.I.R. 1936 Pat. 191.

C. P. Code—(Contd.)

Sec. 34—Mortgage decree—subsequent interest on decretal amount, if allowable.

Sec. 34. C. P. Code applies to mortgage decrees and authorises the allowance of interest on the decretal amount from the date fixed for redemption up to the date of realisation. Even Or. 34 as it stood before the amendment of 1929, does not in any way exclude the allowance of subsequent interest on the decretal amount but permits it as is clear from the old r 4 (1) and the specific provision in the new rule 11 only gives effect to previous judicial decisions. (*Sir George Lowndes*).

KUSUM KUMARI vs. DEBI PRASAD DHANDHANIA,

63 I.A. 114=15 Pat. 210=40 C.W.N. 328=17 P.L.T. 89=1936 A.L.J. 108=1936 A.W.R. 204=38 Bom. L.R. 349=1936 O.W.N. 283=70 M.L.J. 355=43 M.L.W. 268=1936 M.W.N. 308=63 C.L.J. 154=A.I.R. 1936 P.C. 63=160 I.C. 285.

Sec. 34—Interest between the date of mortgage and date fixed for redemption, if recoverable at contract rate—Special law to the contrary—Effect of.

Up to the period of grace fixed by a preliminary mortgage decree, that is, the date fixed for redemption, the question of interest is one of contract between the parties and the mortgagee is entitled to recover at the contractual rate provided he is allowed by the law so to do which the only matter for the Court to consider. Consequently where the transaction is governed by the rule of Damdupat as under Sec. 6 of the Santal Perganas Settlement Regulation, and the limit of interest recoverable has been reached before the institution of the suit no further interest can be allowed between that date and the date fixed for redemption. But interest on the decree is not additional interest on the loan or debt—the latter being merged in the decree as soon as the decree is made and consequently such interest is not subject to the rule of Damdupat or any

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other restrictive rule which may apply to the transaction. (*Sir George Lowndes*.)

KUSUM KUMARI vs. DEBI PRASAD DHANDHANIA.

63 I.A. 114=15 Pat. 210=40 C.W.N. 328=17 P.L.T. 89=1936 A.L.J. 108=1936 A.W.R. 204=38 Bom. L.R. 349=1936 O.W.N. 283=43 M.L.W. 268=70 M.L.J. 355=1936 M.W.N. 308=63 C.L.J. 154=A.I.R. 1936 P.C. 63=160 I.C. 285.

Sec. 35—Costs incidental to suits—Meaning of—Costs for obtaining leave to sue by Receiver, if such costs—Jurisdiction of Courts to award such costs.

The costs incidental to all suits" referred to in Sec. 35 of the C. P. Code does not only include costs from the institution of the suit to its termination, but also includes costs incurred by a party before the institution of a suit, but naturally or intimately connected with the suit. Where therefore the official Receiver was appointed Receiver in a suit for partition pending in the High Court in its Ordinary Original Jurisdiction but he had no power to bring suits of a certain nature without the leave of the Court, held, that the costs incurred in obtaining such leave was incidental to the suit of the nature contemplated and the Court had jurisdiction to award such costs in the suit. (*R. C. Mitter J.*)

SERMAL DALMIA vs. MANINDRA LAL DUTTA.

40 C.W.N. 762.

Sec. 35—Witnesses summoned but not examined—costs, if can be allowed.

The cost of witnesses who are summoned through the Court, but are not examined as witnesses, should not be allowed. (*Jai Lal J.*)

KHERATI LAL vs. JANKI PERSHAD.

38 P.L.R. 219=164 I.C. 689(1) = A.I.R. 1936 Lah. 681.

Sec. 35—Person whose appeal is allowed and case remanded for retrial, if

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entitled to costs on his ultimate success in the trial Court.

Where a person whose suit was dismissed by the trial Court succeeds in the appellate court, and the case is remanded by the appellate Court for trial in accordance with law he is entitled to his costs if he ultimately succeeds in the trial court. In such circumstances however the fairer order would be to direct that the costs of the appeal in the appellate Court should abide the final result in the suit. (*Mackney J.*)

SURYA NATH SINGH vs. SHEO KARAM SINGH.

A.I.R. 1936 Rang. 316 = 164 I.C. 133.

Sec. 35—Suit for recovery of amount alleged to be due from employee Claim for set-off on account of arrears of pay by defendant—plaintiff's case found to be false—Court in allowing defendant's claim for set-off, if can grant costs also.

The plaintiff sued for recovery of a certain amount alleged by him to be due from the defendant, an employee dismissed from service. The defendant claimed a set off on account of arrears of pay. The Court found the plaintiff's claim to be substantially false but it allowed the defendant's claim for set off. *Held*, that the Court was under the circumstances justified in giving the defendant his costs to the plaintiff. (*Nasim Ali & Henderson JJ.*)

JITENDRANATH ROY vs. GNANADAKANTA DAS GUPTA.

A.I.R. 1936 Cal. 277.

Sec. 35—Mortgage suit—puisne mortgagee impleaded contesting claim—costs, if can be saddled on him.

In a mortgage suit, the puisne mortgagees were impleaded as defendants. They contested the claim of the prior mortgagee, but the suit was decreed with costs against all the defendants. The puisne mortgagees contended that they could not be saddled with costs. *Held*, that Sec. 35, C. P. Code, is clear that the Court has discretion in the matter of costs. There is no principle of law which makes it wrong or improper for a Court to saddle

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with costs the real contesting defendants to a suit, and where in a mortgage suit, the puisne mortgagees are the real contesting defendants, they can certainly be saddled with costs along with the other defendants. (*Young C. J. & Monroe J.*)

SITAL DAS vs. PANJAB SINDH BANK LTD., LYALLPUR.

17 Lah. 520 = A.I.R. 1936 Lah. 607 = 164 I.C. 841 = 38 P.L.R. 1024.

Sec. 36—Power of Civil Court to grant farm of land belonging to judgment debtor in execution proceedings—order making lease money payable by instalments, if illegal.

A Civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease-money payable by instalments, it might be said that the Court has acted in an unwise and indiscreet manner by not demanding the entire lease-money at once, but it cannot be said that the Court has passed an order which it had no jurisdiction to pass. Sec. 36, C. P. Code applies to such a case, and the Court can enforce payment of the lease-money by applying the provisions of the Code relating to execution of decrees. 1 Lah. 192 followed. (*Addison & Abdul Rashid JJ.*)

PUNJAB NATIONAL BANK, LTD., AMRITSAR vs. SHAMSHER SINGH & ORS.

A.I.R. 1936 Lah. 696 = 38 P.L.R. 936.

Secs. 37 & 42—Applicability of Sec. 37—Power to stay execution under Sec. 42.

Sec. 37 has no reference to a Court to which a decree has been transferred for execution. As regards Sec. 42, if the power to order stay of execution would have been included within the expression "power of executing such decree," the wording would have been of somewhat wider scope. Power to stay execution is not included in Sec. 42. (*Mackney J.*)

M. P. L. CHETTIAR FIRM vs. S. A. L. L. A. VENAPPA CHETTIAR

A.I.R. 1936 Rang. 184 = 162 I.C. 865.

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Sec. 38—Power of executing Court to enquire whether application for final decree was time-barred.

An order made without jurisdiction is not the same thing as an order made in erroneous exercise of jurisdiction. The former is null and void, but the latter is only voidable. An executing Court can only question such decrees as have been passed without jurisdiction, and is not entitled to go behind the decree and investigate whether the application upon which it had been prepared, is time-barred. (*Fazl Ali & Luby J.J.*)

HARLAL KAMTI & ORS. vs. JHARI SINGH.
15 Pat. 51 = A.I.R. 1936 Pat. 93.

Secs. 38 & 39—Decree transferred to another Court for execution against property—Subsequent application to Court which passed the decree for execution by arrest, whether competent.

On the application of the decree-holder, a decree was transferred for execution against the Zamindari property of the judgment-debtor. The property was attached in execution but the sale was stayed under the orders of the Government. Subsequently the decree-holder applied to the Court which passed the decree for execution by arrest of the judgment-debtor. Held, that there was no bar for execution in one court against the party and in another court by other means, and the subsequent application was competent, 15 A. L. J. 532 relied on. (*Harris & Ganganath J.J.*)

MAKHAN LAL vs. BHAGWAN-KUER
1936 A.L.J. 277 = 1936 A.W.R. 342 =
182 I.C. 51 = A.I.R. 1936 AH. 655.

Sec. 39.—Application for transfer on ground specified in sub-Sec. (v) - execution if can be taken out against a judgment debtor who does not satisfy that condition.

Where the condition justifying transfer is that set out in Sec. 39 (1) (b), the intention is that execution should be limited to execution against the judgment-debtor who satisfies that condition. It is not open to a judgment-creditor to obtain an order

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for transfer on the ground that one judgment-debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and then to execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfill that condition. (*Panckridge J.*)

CHHATRAPAT SINGH DUGAR vs. KHARAJ SINGH LAOHMIRAM.

A.I.R. 1936 Cal. 521.

Secs. 39 & 41 & Or. 21, r. 6(2)—Application for transfer of decree—Decree-holder obtaining personally the copy and certificate—Subsequent return of the same to the Court which issued them—Jurisdiction of the Court which passed the decree to deal with the matter.

Where a decree-holder applies for the transfer of his decree for execution and obtains personally the copy and the certificate, it is open to him either to take the copy and the certificate to the Court by which they are sent, or if for some reason he does not desire to do so, to return the copy and certificate to the Court which issued them. If he takes the latter action, then the Court which passed the decree becomes again seized of the matter and, and is either able to grant execution itself or to grant a new certificate for transfer. (*Sulaiman C. J. & Bennet J.*)

MANSARAM vs. BADRI PRASAD & ANR.

1936 A.W.R. 294 = 1936 A.L.J. 254 =
160 I.C. 231 = A.I.R. 1936 All. 369.

Secs. 39, 73 & 115—Decree transferred for execution—executing Court ordering rateable distribution of assets in another decree—remedy of decree-holder.

When a decree is transferred for execution to a Court in the jurisdiction of another High Court and the executing Court orders rateable distribution of the assets of the judgment-debtor attached on the application of another decree-holder, the latter's application for revision of the

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order directing rateable distribution is virtually directed against the order transferring the decree and it is open to the applicant to file a regular suit against his rival decree-holder for refund of assets under Sec. 73 (2), C. P. Code, and the revision, application under Sec. 115 of the Code is not cognisable by the High Court to which the Court transferring the decree is not subordinate. (*King C. J. & Nanavutty J.*)

HARNARAIN SETHI vs. MESSRS BIRD & CO.

1936 O.W.N. 116=160 I.C. 36=A.I.R.
1936 Oudh 132.

Sec. 39 & Or. 21, r. 5—Transfer of decree to another district for execution—certificate of non-satisfaction erroneously addressed to senior Sub-Judge—defect if fatal.

The Court passing a decree sent it for execution in another district, but erroneously addressed the certificate of non-satisfaction to the senior Sub-Judge of that district and not to the District Judge as he should have done. *Held*, that though the transfer was defective, the defect was cured if the application for execution along with the certificate was actually filed in the Court of the District Judge. (*Jai Lal J.*)

DUNI CHAND GOKAL vs. BRIJ LAL & SONS.

38 P.L.R. 505=164 I.C. 693=A.I.R.
1936 Pat. 765.

Sec. 44—Notification under the section—Effect of—Decree of Native State in regard to which such notification issued, how may be enforced in British India.

The provision of the C. P. Code for the transfer of decrees for execution apply only to decrees passed by one British Indian Court. Where in regard to the decree of any Native state, a notification has been issued under Sec. 434 of the Code of 1877 or Sec. 44 of the present Code, the sole remedy of a decree-holder in British Indian Court is to apply for the execution of the decree. A suit on the foreign judgment under Sec 13 of the Code is not maintainable. A British Indian Court to which an application is made for the execution of such a decree is not a transferee court but an ex-

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outing court which has power to decide whether the foreign Court passing the decree sought to be executed was a court of competent jurisdiction. Even if the decree-holder has two remedies, that is, to bring a suit under Sec. 43 and apply for execution under Sec. 44, where he has elected the latter remedy and has been unsuccessful, he cannot sue again under Sec. 43. (*R. C. Mittra J.*)

CHORMAL BALCHAND vs. KASTURI CHAND SARAOGI & ANR.

63 Cal. 1033=40 C.W.N. 591=63 C.L.J. 175.

Sec. 46—Money attached under precept if can be paid to another decree-holder after expiry of 2 months.

When money is attached in execution of a decree it cannot be paid over to another decree-holder who subsequently attaches it. But when money is attached not in execution of a decree, but in pursuance of a precept under Sec. 46, C. P. Code, the effect of which is limited to a period of two months only, it cannot be paid over to another decree-holder who subsequently attaches it. 161 I. C 418 reversed. (*Jai Lal J.*)

GURDAYAL SINGH vs. KHAZAN CHAND.

A.I.R. 1936 Lah. 486=163 I.C. 374.

Sec. 46—Precept to attach money—indefinite order making permanent attachment if valid.

The object of Sec. 46, C. P. Code, is to attach the property of the judgment-debtor in another Court in order to prevent the judgment-debtor alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceeding for the sale of the property in pursuance of an application for execution can be taken. It is for this reason that the effect of attachment in pursuance of a precept is limited to 2 months, and power is given to the Court which passed the decree to extend this period of 2 months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order, stating that an attachment

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is made permanently is not one contemplated by Sec. 46. (*Jai Lal J.*)

GURDAYAL SINGH vs. KHAZAN CHAND.

A.I.R. 1936 Lah. 486 = 163 I.C. 374.

Sec. 47—Relief should be expeditious.

Sec. 47 of the Court should be liberally construed and the decree-holder should get his relief as expeditiously as possible. (*Mohammed Noor & Varma JJ.*)

NOROTTAM DAS vs. KRISHNA PROSAD.

15 Pat. 545 = 17 Pat. L.T. 434 = 162 I. C. 830 = A.I.R. 1936 Pat. 289.

Sec. 47—Suit for rectification of petition of adjustment of decree, if barred.

A suit for the rectification of a petition of adjustment of a decree, upon which an order of satisfaction has been passed, is not barred by Sec. 47, C. P. Code, but is maintainable. (*Guhro & Bartley JJ.*)

ABDUL SATTAR CHOWDHRY vs. ABDUL RUSAN.

40 C.W.N. 914 = 165 I.C. 756 = A.I.R. 1936 Cal. 400.

Sec. 47—Dispute between decree-holder and judgment-debtor—separate suit, if barred.

Sec. 47, C. P. Code, is a bar to a regular suit, if the object of that suit is to decide a question between a decree-holder purchaser and the judgment-debtor. But where the object of the suit is to settle dispute between decree-holder purchaser and persons other than the judgment-debtor, Sec. 47 cannot be a bar, and it is no objection to say that there was no delivery under or 21, r. 96, C.P. Code (*Ramesan & Cornish JJ.*)

VENKATAKRISHNAYYA vs. VENKATANARAYANA RAO.

A.I.R. 1936 Mad. 733.

Sec. 47—Mortgage suit—question of paramount title, if must be decided in such suit—separate suit, if maintainable.

In a mortgage suit some of the defendants claimed paramount title in the mort-

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gaged property by claiming for themselves occupancy rights. In a later suit between the parties, the same question was again raised. It was contended that Sec. 47, C. P. Code, was a bar to such a suit, because this question could only be decided in an execution proceeding. Held, that the question could be decided in a separate suit. The bar of Sec. 47, applied only to cases where there was a duty to raise the question in the earlier proceedings. The question of paramount title could not be decided in the mortgage suit, and it was no duty of the defendants to raise such question in the mortgage suit. (*Ramesan & Cornish JJ.*)

VENKATAKRISHNAYYA vs. VENKATANARAYANA.

A.I.R. 1936 Mad. 733.

Sec. 47—Second mortgagee taking mortgage during pendency of suit on first mortgage, if representative of mortgagor.

A second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of Sec. 47, C. P. Code. (*Harris & Ganganath JJ.*)

RAM AUTAR SAHOO & ORS. vs. BATA KRISHNA & ANR.

1936 A.W.R. 422 = A.I.R. 1936 All. 47 = 163 I.C. 926.

Sec. 47—Death of judgment-debtor pending attachment—nephews of judgment-debtor in possession of his estate, if representatives within the meaning of the section.

A judgment-debtor whose undivided interest had been attached in execution died during the pendency of the attachment case. The execution case was dismissed for default, but subsequently revived. The nephews of the judgment-debtor who were in possession of the property claimed to be representatives of the judgment-debtor within the meaning of Sec. 47, C. P. Code. Held, that the possession by the nephews of the property which by reason of the revival of the attachment was not their property, made them persons intermeddling

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with the estate and hence representatives within the meaning of the section. (*Wort. J.*)

RAMESHWAR PRASAD SINGH vs. BAS-DEO SINGH & ANR.

160 I. C. 119 = A.I.R. 1936 Pat. 120.

Sec. 47—Application for transmission of decree for execution—notice of application served by affixture—no declaration by Court of sufficiency of service—judgment-debtor, if can raise pleas of limitation and discharge.

An application for the transfer of a decree to another court for execution was made by the legal representatives of the decree-holder. Notice of this application was served by affixture and not personally. When the property of the judgment-debtor was attached in execution, he applied for raising the attachment on plea of limitation and discharge. It was contended that the judgment-debtor not having raised these pleas at the time of the transmission order, was estopped from raising them subsequently. *Held*, that the service having been effected by affixture, the Court had to declare that the summons had been duly served or to order such service as it thought proper. That not having been done, the principle of constructive *res judicata* could not be applied against the judgment-debtor. (*Pandurang Row J.*)

PALANAPPA CHETTIAR vs. THAI-VANAI ACHI & OTHER.

71 M.L.J. 317 = 1936 M.W.N. 1037 = 44 M.L.W. 460 = A.I.R. 1936 Mad 812 = 165 I.C. 59.

Sec. 47—Decree-holder purchasing judgment-debtor's property in execution of his decree—Decree-holder subsequently dispossessed by judgment-debtor—Suit for recovery of possession, if falls under Sec 47.

A decree holder purchased the judgment-debtor's property in a sale held in execution of his own decree. After the execution proceedings had been concluded, the judgment-debtor dispossessed him, and the decree-holder had to bring a suit for recovery of possession against the judgment-

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debtor. *Held*, that this suit could not be said to be one within the scope of Sec. 47, C. P. Code, as the matter in dispute did not relate to the execution or satisfaction of the decrees, having arisen after the conclusion of the execution proceedings. (*Mackney J.*)

KO TAIK ON vs. N. S. A. R. FIRM.

A.I.R. 1936 Rang. 298 = 161 I.C. 260(1)

Sec. 47 Female limited owner relinquishing estate in favour of a person agreeing to pay her decretal dues—Decree-holder, if can recover decretal debt by application under the section.

Where a female limited owner relinquished her estate in favour of certain persons on their expressly agreeing to pay certain decretal debt due against her, but they failed to pay the same, *held*, that they were upon the principle of justice, equity and good conscience bound to pay the decretal debt in execution of the decree. There was no necessity on the part of the decree holder to take recourse to a separate suit to establish the contractual liability in view of the scope of Sec. 47, C. P. Code. He could proceed by way of an application under Sec. 47, (*Guho & Bartley JJ*)

BHUVEN DRANATH BISWAS vs. SUSHAMOYEE BASU.

40 C.W.N. 601 = 63 C.L.J. 25 = A.I.R. 1936 Cal. 67.

Sec. 47—Dispute between rival decree-holders—order deciding, if appealable.

An order deciding a dispute between rival decree-holders in which the judgment-debtors are not interested is not an order which can be said to arise under Sec. 47, C. P. Code, and such an order is therefore not appealable. (*Madhavan Nair & Burn JJ.*)

VISWANYTHAM REDDI & YARRABANDA PEDDA VENKATRA REDDI & ORS.

59 Mad. 399 = 70 M.L.J. 33 = 1936 M.W.N. 44 = 43 M.L.W. 31 = A.I.R. 1936 Mad. 136 = 160 I.C. 573.

Sec 47—Decision that a person is legal representative of mortgagor-judgment-debtor if appealable.

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The decision that a person is the legal representative of the mortgagor-judgment-debtor is a decision under Sec. 47, C. P. Code, and as decisions under Sec. 47 are to be regarded as decrees by reason of Sec. 2(2), C. P. Code, and are appealable, no revision lies from such a decision, (*Harris & Gangarath JJ.*)

RAM AUTAR SAHU vs. BATA KRISHNA.

1936 A.W.R. 422=1936 A.L.J. 541=
A.I.R. 1936 All. 479=163 I.C. 926.

Sec. 47—Issue of second warrant of attachment—objection by judgment-debtor questioning legality rejected—no appeal by judgment-debtor—issue of second warrant if may be challenged in appeal.

If the judgment-debtor makes an objection under Sec. 47, C. P. Code, questioning the legality of a second warrant of attachment, and the objection is rejected, but the judgment-debtor does not appeal, he is not entitled to appeal on the ground that the issue of the second warrant of attachment without a fresh application for execution was illegal. (*Srinivastava & Thomas JJ.*)

HAFIZ ABDUL RAZZAQ HAJI FIRM vs. BENI MADHAB BASANT RAI.

1936 O.W.N. 47=161 I.C. 393(1)=A.I.
R. 1936 Oudh 240.

Sec. 47—Order by High Court staying execution on security being furnished—order accepting hypothecation bond as security and staying execution, if appealable.

When in pursuance of an order by the High Court directing stay of execution on the judgment-debtor furnishing security, the trial Court accepts a hypothecation bond as sufficient security and passes an order staying execution proceedings, the order, not being a final order, but merely in the nature of an interlocutory order, is not appealable. (*Nanavutty & Smith JJ.*)

SURAJ MOHAN DAYAL vs. SARUP NARAIN & ANR.

1936 O.W.N. 664=A.I.R. 1936 Oudh
369=164 I.C. 424.

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Sec. 47—Order setting aside sale for want of attachment—Second appeal if lies.

An order setting aside a sale on the ground that the executing court had no jurisdiction to sell the property without having first attached it, falls under Sec. 47, C.P. Code, and a second appeal is competent against such an order. (*Bhude J.*)

MATAB MAL JINDA SHAH. vs. DARYA-RAM GURANDITTA.

A.I.R. 1936 Lah. 573=164 I.C. 140.

Secs. 47 & 73—Decree-holder purchasing property in execution of decree—Excess of bid over decretal amount paid into Court—before payment another decree-holder applying for rateable distribution—Right of such decree holder—Order by Court, if appealable.

In execution of a decree, the decree-holder purchased the property and paid into Court the amount of his bid in excess of the amount of his decree. Before the excess amount could be deposited in Court or the auction-sale confirmed, another decree-holder made an application for a rateable distribution in the assets to be realised in execution of the decree of the first decree-holder, and the said application was allowed. *Held*, that the order of the Court was one under Sec. 73, C. P. Code and not under Sec. 47 of the Code, and consequently no appeal lay. (*Jailal, J.*)

ROSHAN LALL vs. SHIBDAS MALL.

A.I.R. 1936 Lah 181=162 I.C. 309.

Sec. 47 & O. 21, r. 2—Execution—Omission by decree-holder to certify payment by judgment-debtor—Application by judgment debtor under Or. 21, r. 2—Effect of failing to make application within the fixed date.

An omission on the part of the decree-holder to certify a payment even, if he may have promised to do so does not entitle the judgment-debtor to override the 90 days limitation of Art. 174 of the Limitation Act for making an application under Or. 21, r. 2, C. P. Code and to secure an investigation of the same matter by invoking Sec. 47 of the Code. The decree-holder

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may be guilty of fraud, but if the judgment-debtor does not avail himself of the procedure laid down in Cl. (2) of the rule, he must be content to let the sale of his properties in execution stand the seek his remedy in damages or otherwise without challenging the sale. The contention that the Court is not helpless in regard to the decree-holder's fraud but may deal with it in the exercise of its inherent jurisdiction is opposed to the scheme of the C. P. Code, as found in Sec. 47 and O. 21, r. 2. (*Macpherson & Dhavle JJ.*)

HARIHAR PROSAD SINGH & ORS. vs. BHUBANESWARI PROSAD SINGH & ORS.

15 Pat. 422 = A.I.R. 1936 Pat. 270 = 162 I.C. 849 = 17 Pat. L.T. 195.

Sec. 47 & Or. 21, r. 92 (3)—mortgage suit—decree passed and sale confirmed—person who was party to the proceedings, if can maintain suit subsequently claiming paramount title adverse to both mortgagor and mortgagee.

The plaintiff who as the legal representative of her deceased husband had been a party to the execution proceeding in a mortgage suit, brought a suit, after the property involved had been sold and the sale confirmed, for a declaration of her paramount title to the suit property as against both mortgagor and mortgagee. *Held*, that the suit was not maintainable as she ought to have raised the question of paramount title in execution proceedings or tried to get the sale set aside under Or. 21, r. 92 (3), C. P. Code. (*Madhavan Nair & Stodart JJ.*)

CHINNATHAYEE vs. LAKSHMI ACHI.

1936 M.W.N. 449 = 43 M.L.W. 740 = 71 M.L.J. 511 = A.I.R. 1936 Mad. 675 = 163 I.C. 619.

Sec. 47 & Or. 21, r. 95—Order passed on application by auction purchaser under Or. 21, r. 95, C. P. Code if appealable.

An order passed by the Court on an application under Or. 21, r. 95, C. P. Code by an auction purchaser who is also a decree-holder is an order under Sec. 47 of the

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C. P. Code and appealable as such. 53 Cal. 781 followed. (*Agha Haidar JJ.*)

KINAD DEB & ANR. vs. PARTAP SINGH & ANR.

38 P.L.R. 621.

Sec. 47 & Or. 43, r. 1.—Decree-holder auction-purchaser failing to deposit purchase money—Rival decree-holder applying for recovery of deficiency of price obtained on resale from the defaulting decree-holder Appeal, if lies from an order rejecting the application.

No appeal lies in disputes between rival decree-holders seeking to attach the same property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter-se*, they being not within the purview of Sec. 47, C. P. Code. So where a decree-holder auction-purchaser having failed to deposit the purchase money, the property was re-sold, and a rival decree-holder applied for realisation from the decree-holder of the deficiency of price resulting from the resale, and the application was rejected as unmaintainable, *held*, that the order rejecting the application was not appealable being outside the purview of Sec. 47 of the Code and no appeal from such an order being provided for by Or. 43, r. 1, C. P. Code. (*King C. J. & Nunnally JJ.*)

MOHAMMAD SALAMATULLAH vs. MURLIDHAR.

1936 O.W.N. 559 = A.I.R. 1936 Oudh = 163 I.C. 175(2).

Sec. 48 (1) (b)—“Subsequent order”, meaning of—Order by executing Court directing payment of decretal sum by instalments, if proper.

The subsequent order under Sec. 18 (1) (b) C. P. Code, must be an order made by the Court which passed the decree and not an order made in the course of the execution. Therefore an executing Court as such has no power to make an order which would operate as a subsequent order within the meaning of Sec. 48 (1) (b) of the Code directing payment of the decretal amount at a

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certain date or on certain dates, (*King C J.*)

NIHAL HUSHAIN vs. SYED AHMED.

1936 O.W.N. 517=A.I.R. 1936 Oudh
266=162 I.C. 715.

Sec. 48 (2) (a) —*Objections to execution of decree raised by judgment-debtor—proceedings for decision of objections unnecessarily prolonged—re-attachment, if may be allowed.*

Mere raising, of objections so as to prolong execution proceedings beyond the period of limitation cannot be regarded as fraud for the purposes of Sec. 48. Where time taken by the Court in deciding objections raised by a judgment-debtor to the execution of a decree, has the apparent effect of making the decree time barred an application for re-attachment, will be maintainable, as being one is continuation and ancillary to the original application for execution. 18 All. 482 relied on. (*Coldstream J.*)

TULSI RAM vs. E. D. SASSOON & CO.

A.I.R. 1936 Lah 813=161 I.C. 963.

Sec. 80 —*Hindu widow succeeding to her husband's estate—rent from tenants falling due after husband's death if attachable in execution of decree against him.*

Rents from tenants of the estate left by a deceased Hindu which accrue due after his death when the estate is in possession of his widow as his heir, are part of his estate in the hands of his legal representative and are attachable in execution of a decree against him. 19 All. 235 disapproved. (*Niamatullah & Ailsop JJ.*)

PHOOL KUNWAR vs. RIKHI RAM.

57 All. 714.

Sec. 50 —*Provisions of the section if obligatory—decree-holder if must proceed under Sec. 50, when execution sought against legal representative.*

The language of Sec. 50, C. P. Code, is permissive. But this does not mean that recourse to the section may not be obligatory. If a decree-holder does not desire

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to proceed with the objection after the decree-holder's death or if there are other parties on record against whom a decree can be executed, there will be no occasion to have recourse to Sec. 50, but if the execution of the decree is necessary against the legal representative of the deceased judgment-debtor, the decree-holder has no option but to proceed under Sec. 50. He must apply to the Court to execute the decree against the legal representative and notice must issue to the legal representative as required by Or. 21, r. 22, C. P. Code. 41 M. L. J. 547 followed. (*Cornish, Varadachariar, Wadsworth, Venkataramana Row & Lakshmana Row JJ.*)

KANCHALALAI PATHAR vs. SHAHAJI RAJAH SHAHEB.

59 Mad. 461=43 M.L.W. 238=1936 M.
W.N. 60=70 M.L.J. 162=A.I.R. 1936
Mad. 205=162 I.C. 156.

Sec. 50 & Or. 21, r. 22 —*Property of judgment-debtor ordered to be sold in execution of decree—death of judgment debtor before actual sale—sale held without bringing legal representatives on record, if valid.*

Where the property of a judgment-debtor was ordered to be sold in execution of a money-decree against him, but he died before the sale actually took place, and the sale was allowed to be completed without bringing the legal representatives of the judgment-debtor on the record, held, that the omission amounted to an illegality and not a mere irregularity, and the sale was therefore a nullity. 42 Cal. 72 relied on; 41 M. L. J. 547 & 50 M. L. J. 66 approved. (*Cornish, Varadachariar, Wadsworth, Venkataramana Row & Lakshmana Row JJ.*)

KANCHALALAI PATHAR vs. SHAHAJI RAJAH SAHIB & ORS.

59 Mad. 461=70 M.L.J. 162=43 M.L.
W. 238=1936 M.W.N. 60=A.I.R. 1936
Mad. 205=162 I.C. 156.

Sec 51 & Or. 40, r. 1 —*Appointment of Receiver for receiving daily earnings of judgment-debtor's theatre after collection*

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and keeping accounts—Order if applies to collections at gate.

Sec. 51, C. P. Code, prescribes the procedure in execution and lays down that the Court may on the application of the decree-holder order the execution of the decree by appointing a receiver. No further restrictions have been placed on the power of the Court in this section nor is the nature of the property been defined of which a Receiver can be appointed. The section is therefore evidently governed by the provisions of Or. 40, r. 1. Therefore, where a receiver is appointed in execution of a decree to receive the earnings collected and to keep accounts of a cinema belonging to the judgment-debtor, but there is no reference in the order for collections of money at the doors of the cinema, the money so earned is (property) within the meaning of Or. 40, r. 1, C. P. Code, and the order of the Court appointing a receiver to receive those earnings is not *ultra-vires*. (*Din Mahammad, J.*)

BALKISSEN vs. NARAIN DAS CHELARAM FIRM.

A.I.R. 1936 Lah. 239 = 162 I.C. 861.

Sec. 52—Legal representative—Each person liable for the debts of the deceased to the extent of assets in his own hand.

If more than one person is in possession of the assets of a deceased debtor, everyone of them is liable to the extent to which he is in possession of the assets of the deceased. No one can be made liable for the entire liability of the deceased. (*Iqbal Ahmad J.*)

MAANI GIR vs. AMAR JATI.

63 All. 595.

Sec. 52—Personal representative not receiving part of the deceased's assets, if can be sued by creditor of the deceased.

Where in a creditor's suit on the basis of a bond against the personal representative of the deceased executant, the Court is satisfied that the defendant had received no part of the deceased's assets, the suit should be dismissed. (*Harries J.*)

TARACHAND vs. DHARMAN & ORS.

1936 A.W.R. 32.

C.P. Code—(Contd.)

Sec. 55—Liability of surety on failure of judgment-debtor to apply for insolvency.

Where a security bond under Sec. 55, C. P. Code clearly states that the liability of the surety is to arise on the failure of the judgment-debtor to apply for insolvency, it is not open to the surety to say that his liability arises not on the failure of the judgment-debtor to apply for insolvency but on his further failure to appear when called upon. (*Becket J.*)

MOHAMMAD SHARIFF vs. BAWA FAQIR SINGH.

160 I.C. 570 = A.I.R. 1936 Lah. 918.

Sec. 55—Failure of judgment debtor to apply for insolvency—liability of surety—extent and duration of such liability.

The liability of the surety under Sec. 55, C. P. Code arises on the failure of the judgment debtor to apply for insolvency; such liability can be enforced in execution proceedings and the execution proceedings which can be taken against the surety are not affected by what happens to the execution proceedings previously taken out against the judgment-debtor, unless the decree-holder chooses under Sec. 55 (4), the alternative method of having the judgment-debtor committed to the civil prison, in which case alone, the surety is automatically discharged. 138 I. C. 198 relied on. (*Becket J.*)

MOHAMMAD SHARIFF vs. BAWA FAQIR SINGH.

160 I.C. 570 = A.I.R. 1935 Lah. 918.

Secs. 55 (3) & (4)—Security bond under Sec. 55 (3) & 4—Order on application under Sec 55 directing necessary bond to be executed—Nature of bond that must be executed.

A security bond executed under sub-secs. (3) & (4) of Sec. 55, C. P. Code should be construed in the light of the order directing the security to be given. Where on the judgment-debtor applying under Sec. 53 that he might be discharged from arrest upon complying with the terms of Sub-Secs. (3) & (4) of that section, the Court ordered that the necessary bond should be executed, held, that the bond to be executed must be a bond

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as required under Sec. 55 (4), (*Page C. J. & Mya Bu J.*)

LOUIS VICTOR COLATO vs. U. AUNG DIN.

14 Rang. 190=162 I.C. 251=A.I.R. 1936 Rang. 168.

Sec. 55 (4)—*Debtor when can be deemed to have been called upon to appear, within the meaning of the section.*

In order that a debtor or an insolvent can be deemed to have been called upon to appear within the meaning of Sec. 55 (4), C. P. Code, it is not essential that special notice calling upon him to appear should have been served. It is sufficient to satisfy the requirements of Sec. 55 (4), if the advocate representing the debtor, is informed on his behalf by the Court that the debtor would be required to be present on the next date for supplying any information required by the Court. (*Page C. J. & Mya Bu J.*)

LOUIS VICTOR COLATO vs. U. AUNG DIN.

14 Rang. 190=162 I.C. 251=A.I.R. 1936 Rang. 168.

Sec. 55 (4)—*Security bond undertaking to produce debtor and to make him to prosecute insolvency application to its very end—extent of liability.*

When the sureties executing a security bond undertook to produce the debtor before the Court whenever directed, to cause him to file an insolvency petition within a certain time and to get him to prosecute it to its very end, *held*, that the liability undertaken by the sureties upon the bond was satisfied by the adjudication of the judgment-debtor upon his petition, and liability did not extend beyond that point to the final discharge, though by adequate words the sureties might have extended their liability until discharge. (*Cornish J.*)

KARUPPANNA GUNDBAN vs. CHIDDAMBARAM CHETTIAR.

71 M.L.J. 646=1936 M.W.N. 1031=44 M.L.W. 647=A.I.R. 1936 Mad. 963=165 I.C. 864.

C. P. Code—(Contd.)

Sec. 60 (1) (c)—*Provisions of the section, how far mandatory.*

The provisions of Sec. 60 (i) (c), C. P. Code, are mandatory and a Court when it has become cognisant that a house attached in execution of a decree is the property of an agriculturist, is bound to withdraw the attachment, notwithstanding the fact that no objection to the attachment has been taken by the judgment-debtor. (*Agha Haidar J.*)

RAMCAHND vs. CO-OPERATIVE SOCIETY OF KHARAR & ANR.

38 P.L.R. 691=A.I.R. 1936 Lah. 930.

Sec. 60 (1) (c)—*"Agriculturist," meaning of.*

There is no justification in the wording of Sec. 60 of the C. P. Code for holding that for the purpose of that section the term "agriculturist" excludes a large landowner or a person who does not depend solely or mainly on cultivation for his livelihood. But at the same time there is no doubt that a person who does not himself till land and earn his living thereby, wholly, or partly is not an agriculturist within the meaning of the section. (*Coldstream J.*)

GURBAKSH SINGH vs. LAL CHAND DARSHAN CHAND.

38 P.L.R. 333=164 I.C. 690=A.I.R. 1936 Lah. 737.

Sec. 60 (1) (c)—*House used by judgment-debtor directly for agricultural purposes, if exempt from attachment.*

A judgment-debtor who occupies his house directly for agricultural purposes in housing his cattle, his implements, his seed, paddy and his labourers, must be regarded as occupying the house as an agriculturist. Therefore he is entitled to have his house exempted from attachment. 11 Rang 372 (F. B.) referred to. (*Baguley & Mosely JJ.*)

MAUNG TUN AYE vs. MAUNG HLA HLN,

A.I.R. 1936 Rang. 215=162 I.C. 694.

Sec. 60 (1) (c)—*Objection to attachment of a house on the ground of its being*

C. P. Code—(Contd.)

occupied by an agriculturist—burden of proving exemption from attachment.

The judgment-debtors objected to the attachment of their house on the ground that they were agriculturists and as such their house was exempt from attachment under Sec. 60, proviso (c), C. P. Code. The evidence showed that they had some lands which they cultivated not personally, but by servants, and the said lands were situated in another village. It was also proved that they did contractor's work and also carried on a shop. *Held*, that under the circumstances, the judgment-debtors could not be said to be agriculturists within the meaning of Sec. 60, proviso (c), C. P. Code, so as to render their residential house exempt from attachment, (*Jai Lal J.*)

MUHAMMAD AKBAR vs. HARBANS SINGH.

161 I.C. 16 = A.I.R. 1936 Lah. 532.

Sec. 60 (1) (c)—*Attachment of house in execution of decree against judgment-debtor who is not an agriculturist—death of judgment-debtor—house passing to his legal representatives, who is an agriculturist—attachment, if may continue.*

A decree was passed against A, and was executed against him during his lifetime, and his house was attached, on A's death, the attached house passed to his heir, who was by profession an agriculturist and who required the house for purpose of agriculture.

Held the decree having been executed against A, the profession of A had to be considered in determining whether the house was exempt from attachment under Sec. 60, C. P. Code. The heirs of A, could not claim to have the house released, on the ground that it was required for purposes of agriculture. (*Jai Lal J.*)

HIRDA RAM vs. MUHAMMAD DIN.

A.I.R. 1936 Lah. 895.

Sec. 60 (1) (c)—*Limitation, if any, for filing objections under the section.*

An objection under Sec. 60 (1) C. P. Code cannot be dismissed on the ground of delay in preferring it, as no period of limi-

C. P. Code—(Contd.)

tation has been prescribed within which such objection must be filed. (*Agha Haidar J.*)

FATTA vs. SHAM SUNDAR & ORS.

38 P.L.R. 669.

Sec. 60 (1) (e)—*Attachment of share of village profits before end of year, if valid.*

The right of a co-sharer to village profits does not accrue till the end of the agricultural year, and consequently any attachment of the share of a co-sharer in village profits before the first day of the agricultural year next following that to which the village profits refer, is an attachment of a mere right to sue, and a sale held in pursuance of such attachment being sale of a mere right to sue is invalid and of no effect (*Vivian Bose J.*)

JAGANNATH vs. JAMNAVALLABH.

A.I.R. 1936 Nag 218.

Sec. 60 (1) (f)—*Palas for the worship of certain deities, if can be attached and sold in execution.*

Mere palas for the worship of certain deities cannot, under proviso (f) to Sec. 60 of the C. P. Code, be attached and sold in execution of a decree, if the sale is in favour of a class of persons who are entitled to perform the services. (*Courtney Terrel & Dhavle JJ.*)

RAMSARAN PANDE vs. ISWAR PANDE & ANR.

17 P.L.T. 77 = 160 I.C. 355 = A.I.R. 1936 Pat. 10.

Sec. 60 (1) (g)—*Remission of land revenue—if may be attached,*

Apart from Sec. 11 of the Companies Act, the C. P. Code makes all political pensions exempt in whatever form they are granted by the Government, that is to say, an allowance granted by the Government in the form of remission of land revenue or assignment of land revenue, and if the grounds for grant of pension are political, such remission or assignment of land revenue would be exempt from attachment. (*Jailal J.*)

ACHHRU MAL vs. BALWANT SINGH.

38 P.L.R. 531.

C. P. Code—(Contd.)

Sec. 60 (1) (k)—*Provident Fund maintained by College authorities, if immune from attachment.*

The Provident Fund maintained by the College authorities and constituted by the authority of the Government is immune from attachment as long as the money remains in the Fund. (*Khaja Mohammed Noor & Madan JJ*)

KRITYANAND SINGH vs. SAILESWAR SEN.

17 P.L.T. 731.

Sec. 60 (1) (k)—*Mutual Benefit Fund—Registered Company—call money payable to a member or his nominee or legal heirs—call money not part of share capital—member having no control over it—if liable to attachment as member's assets.*

The fund does not form part of the assets of a deceased member of a Mutual Benefit Fund. It is available for payment to, and liable to be distributed in favour of, the nominees or legal heirs of the deceased, according to the rules of the Society by which he agreed to be bound when he became a member and entered into a contract with the Society. The said contract can be enforced by the legal heirs, as they are in the position of a cestui que trust. (*Venkataramana Rao J.*)

THIAGARJU vs. K. VENKATARAMA AVYAR.

70 M.L.J. 581=43 M.L.W. 527=1936 M.W.N. 333=162 I.C. 889.

Sec. 60 (1) n—*Right of maintenance, if can be attached.*

The true test to lay down for determining whether a right to maintenance is attachable or not is whether such right is a purely personal right not heritable and not assignable or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected from attachment under the provisions of the C. P. Code, but if it is the latter, it will not be exempt from attachment. (*Addison A.C.J & Din Mohammed J.*)

CHUNI LAL, OFFICIAL RECEIVER vs. JOGOPAL.

17 Lah. 378=38 P.L.R. 707=A.I.R. 1936 Lah. 56=163 I.C. 103.

C. P. Code—(Contd.)

Sec. 60 (1) (n)—*Pocket money allowed by father to disinherited son, if in the nature of future maintenance—Attachment of the same, if can be claimed.*

A father while disinheriting his son provided for his board and lodging and in addition allowed him a monthly allowance of Rs. 100 as pocket money. Certain creditors sought to attach this allowance in execution of their decrees. *Held*, that the allowance could be treated as future maintenance under Sec. 60 (1) (n), C. P. Code, because, out of this sum, the debtor was expected to supply himself with such necessities of life having regard to his position in life, could be required for his sustenance and physical well being. The allowance therefore was exempt from attachment under Sec. 60, C. P. Code, A. I. R. 1935 Lah. 811, 10 C. W. N. 1102 & A. I. R. 1936 Lah. 55 distinguished. (*Agha Haidar J.*)

TARACHAND vs. BAKHSI SHER SINGH.

38 P.L.R. 702=A.I.R. 1936 Lah. 944.

Secs. 63 & 73—*Two decrees passed against same person—execution proceedings in two courts—property sold & purchased by one decree-holder—other decree-holder, if entitled to apply for rateable distribution.*

The appellant and the respondent who had obtained separate decrees against the same persons applied for execution of the decrees. The appellant's decree was sent to the District Court, Chinglepet for execution, and the respondent's decree to the Sub-Court of that place. In pursuance of the respondent's decree the properties were attached by the Sub-Court and purchased by the decree holder who was allowed to set off the entire purchase money against the decretal amount. Subsequently, the respondent got the same properties attached in execution of his decree, but coming to know that the sale had already been effected, applied to the District Court under Sec. 63, C. P. Code to call for the sale proceeds in the previous execution case and distribute them rateably. *Held*, that the application was maintainable under Sec. 73 read with Sec. 63, C. P. Code. The proper procedure under the circumstances

C. P. Code—(Contd.)

was to direct the purchaser to make his choice either to have a resale or to pay into Court so much of the price as may become due on rateable distribution to his rival decree-holder. (*Vinkatasabba Rao JJ.*)

MEGRAJ ISWARADAS vs. CORPORATION OF MADRAS.

59 Mad. 1028=44 M.L.W. 358=71 M.L.J. 328=1936 M.W.N. 685=A.I.R. 1936 Mad. 797.

Secs. 63 & 73—Sale of property under attachment by Court of superior grade or earlier attachment by Court of same grade, if valid—court by which sale proceeds to be distributed.

The sale by a Court of an inferior grade of property under attachment by a superior Court or under an earlier attachment by a Court of equal grade is valid. But the distribution of the proceeds is to be made by the superior among the attaching Courts or where the Court are of equal grade by the Court which first attached the property to which Court the sale proceeds must be sent. The distribution is to be made on the principle that sale proceeds of common properties attached by different decree-holders are to be divided rateably between such decree-holders. (*R. C. Mitra J.*)

SURENDRA KUMAR GUHA vs. JAMINI KUMAR GUHA & ORS.

40 C.W.N. 1307=A.I.R. 1936 Cal. 723.

Secs. 63 & 73—Execution transferred to Higher Court—Fresh application if necessary to such court for execution or for rateable distribution.

Two decree-holders got two separate decrees against the same judgment-debtor, one from the Court of a sub-judge, 2nd class and another from Sub-judge, 1st class. Both decree-holders attached the same property of the judgment-debtor in execution. The decree-holder who obtained his decree in the court of the sub-judge, 2nd class, then applied for transfer of execution proceedings to the court of the sub-judge, 1st class. That court however held that applicant was entitled to rateable distribution because he had not applied for execution in the prescribed form in his Court. *Held*, that as soon

C. P. Code—(Contd.)

as the proceedings relating to the execution of his decree were transferred by the sub-judge, 2nd class to the court of the sub-judge 1st. class, the applicant became entitled to a rateable share in the assets realized by the execution of the decree by the other decree-holder and no fresh application for execution even for grant of a rateable share was necessary in the court by which the assets were held. (*Jailal J.*)

BALMUKUND vs. RAMSARAN DAS.

38 P.L.R. 281=165 I.C. 59=A.I.R. 1936 Lah. 519.

Sec. 66—Application of the section—Heir of ostensible purchaser not contesting suit—section, if applicable.

The prohibition contained in Sec. 66, C. P. Code. is against the suit being maintained against any person claiming title, etc. Where the heirs of the ostensible purchaser do not contest the plaintiff's suit based on benami purchase, and they do not come forward and claim any title in the property, the suit is not barred by the provisions of Sec. 66, C. P. Code. (*Thom & Smith JJ*)

ASGHARI BEGAM vs. KANHAIYA LAL.

1936 A.W.R. 244=1936 A.L.J. 1169=165 I.C. 709=A.I.R. 1936 All. 750.

Sec. 66—Title to property not challenged—suit brought on footing that defendant had no longer title to keep money advanced to him—suit, if falls within Sec. 66.

The plaintiff sued to recover certain money advanced by him to the defendant for the purchase of a piece of land. The property had been duly purchased, but the plaintiff though agreeing that the arrangement was that the property was to be purchased for all the *ijaradars* who contributed the purchase money, did not endeavour to assert his title to his share of the land, nor challenged the title of the defendant to the property. *Held*, that the suit was not one within Sec. 66, C. P. Code. (*Dhavsle J.*)

NISAN SINGH vs. RAM CHANDRA SAO.

162 I.C. 553=17 Pat. L.T. 591=A.I.R. 1936 Pat. 429.

C. P. Code—(Contd.)

Sec. 66—Auction purchases made when C. P. Code, VIII of 1859 in force but suit brought when Act V of 1908 in force—Law applicable.

Where in a suit instituted when C. P. Code, 1908 is in force, the allegation was that an auction purchase made at the time when the C. P. Code, 1859 was in force was really a benami purchase for the benefit of the plaintiff's predecessor although made in the name of the predecessor of the defendants, held, that Sec. 260 of the Code of 1859 and not Sec. 66 of the present Code of 1908 was applicable to the case. (*Rau J.*)

MANIR AHMED vs. OREDAL HAQUE.

40 C.W.N. 470.

Sec. 68—Civil Court, if bound to transfer execution proceedings to Collector where mortgaged property sought to be sold is ancestral.

Where the mortgaged property which is sought to be sold in execution of a decree, is found to be ancestral, the Civil Court is bound under Sec. 68, C. P. Code, to transfer the execution proceedings to the Collector. (*Srivastava & Nanavutty JJ.*)

BHOLANATH vs. MAHARANI KUER.

1936 O.W.N. 489 = 162 I.C. 362 = A.I.R. 1936 Oudh 280.

Sec. 68 Sch. III para. 11—Execution proceedings in mortgage decree transferred to Collector—Sale officer making a reference about correct extent and description of property—Court answering the query and returning file—Date from which the Collector can be said to be seized of the execution case.

Where the execution proceedings in a mortgage decree is transferred to the Collector under Sec. 68, C. P. Code, but after the transfer, the Collector makes a reference to the Court concerning the correct extent and description of the property to be sold and the Court answers the queries made by the Collector and at the same time returns the file to him, the Collector can only be said to be seized of the execution case from the date of the latter order and not from

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the date when the order transferring the execution proceedings first reached him. (*Srivastava & Nanavutty JJ.*)

BHOLANATH vs. MAHARANI KUER.

1936 O.W.N. 489 = 162 I.C. 562 = A.I.R. 1936 Oudh 280.

Sec. 68 & Sch. III, para. 11—Mortgage decree—Transfer of execution proceedings to Collector—Property under sale again mortgaged without obtaining Collector's permission—Deed, if void.

Where after the transfer of execution proceedings in a mortgage decree to the Collector under Sec. 68, C. P. Code, a fresh mortgage deed is executed without the written permission of the Collector, the latter mortgage deed in respect of the property under execution sale is void under Sch. III, para 11, C. P. Code. (*Srivastava & Nanavutty JJ.*)

BHOLANATH vs. MAHARANI KUER.

1936 O.W.N. 489 = 162 I.C. 362 = A.I.R. 1936 Oudh 280.

Sec. 73—Different decree-holders apply—ing to same Court for execution—proceeds available for rateable distribution.

When one decree-holder has put his decree into execution but before the sale proceeds are received by the Court, other decree-holders of the same judgment-debtor apply to the same Court for execution of their decrees, Sec. 73 applies and the entire fund realised or received by the executing Court is to be rateably distributed amongst all the decree-holders. The decree-holders applying subsequently have not to do anything more than apply for execution. (*R. C. Mitter. J.*)

SURENDRA KUMAR GUHA vs. JAMINI KUMAR GUHA.

40 C.W.N. 1307 = A.I.R. 1936 Cal. 723.

Sec. 73—Creditor attaching joint family property in execution of decree against father father later adjudicated insolvent—another creditor obtaining decree against father and sons and attaching son's interest

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only, later selling the joint properties—claim by previous creditor for rateable distribution, if maintainable.

A creditor filed a suit against the father of a Hindu Joint family and attached the joint family properties. Subsequently he obtained a decree, but the father was shortly after adjudicated an insolvent. Thereafter another creditor with the leave of the Court sued the father and the sons and obtained an attachment before judgment of the son's share alone. After obtaining a decree he applied for execution by the sale of the son's share, and the sale proceeds realised were deposited into Court. The previous decree-holder who had in the meantime applied to execute his decree, prayed for rateable distribution of the sale proceeds realised in the other execution proceedings. It was contended that he was not entitled to claim rateable distribution.

Held, that though it was not competent for him to sell the father's interest he was not debarred from selling the son's interest, and he was entitled to sell the son's interest in the property although the prayer was for the attachment for the entire joint family property. The application for rateable distribution was therefore maintainable. (*Vankataramana Rao. J.*)

PALANIAPPA CHETTIAR vs PALANI GOUNDAN.

71 M.L.J. 541 = 165 I.C. 684(2) = 1936 M.W.N. 1142 = 43 M.L.W. 615 = A.I.R. 1936 Mad. 948

Sec. 73—*Decrees obtained by two persons against different persons but executable against same property—one decree-holder attaching property—other decree-holder if can claim rateable distribution.*

A strict literal construction of the expression "the same judgment debtor" in Sec. 73, C. P. Code, cannot be adopted in the sense that the decrees must be against the same person's co-nominees. All the judgment debtors in each of the several decrees need not be identically the same. It is sufficient if there is one judgment-debtor common to all the decrees. Where decrees are passed capable of being executed against the same estate, they may without unduly stretching the language of Sec. 73, C. P. Code, be regarded as passed against

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the same person. (*Beasely C. J. Pandrang Raw & Cornish JJ.*)

VARJI RAMAKRISHNAN CHETTIAR & ORS. vs. KASI VISWANATHAN CHETTIAR & ORS.

59 Mad. 93 = 69 M.L.J. 711 = 1935 M. W.N. 960 = 43 M.L.W. 835 = 159 I.C. 501 = A.I.R. 1936 Mad. 40.

Sec. 73—*Decree passed against some persons as heirs of another person and a decree passed against the same persons in their individual capacity, if decrees passed against the same judgment debtor.*

A decree passed against certain persons as heirs of another person and a decree passed against the same persons in the individual capacity are decrees passed against the same judgment-debtor within the meaning of Sec. 73 of the C. P. Code, and rateable distribution can be claimed by the holder of one such decree in an execution case by the other. (*Nasim Ali & Henderson JJ.*)

HEMENDRA NATH RAY CHOWDHURY vs. EAST BENGAL COMMERCIAL BANK.

63 Cal. 923 = 40 C.W.N. 570 = A.I.R. 1936 Cal. 210 = I.C. 702.

Sec. 73—*Decree holder purchasing in execution sale and setting off purchase price, against decretal amount—other decree-holders apply for execution after the sale and praying that purchase price be brought into Court for rateable distribution—such distribution, if can be claimed.*

In a sale in execution of his decree, the decree-holder himself purchased the property at a price less than the amount of the decree and set it off against the decretal amount. Later on, some other decree-holders of the same judgment-debtor applied for execution of their decrees and prayed for an order on the purchasing decree holder to bring into Court the entire amount of purchase money for purposes of rateable distribution. *Held*, that the only amount that the purchaser decree-holder was bound to bring into Court, was the sum due to those decree-holders whose execution applications were pending on the date of the sale. Decree-holders applying

C. P. Code—(Contd.)

after the sale were not entitled to claim rateable distribution. (*Venkatasubba Rao J.*)

A. M. A. MURUGAPPA CHETTIAR vs. S. M. A. M. RAMA AMI CHETTIAR.

59 Mad. 342=1935 M.W.N. 792=42 M.L.W. 564=159 I.C. 228=A.I.R. 1935 Mad. 893.

Sec. 73—Principles governing rateable distribution.

Rateable distribution should be made under Sec. 73, C. P. Code, according to the amount due to each decree-holder at the time the distribution is made after taking into account any payment or satisfaction to any decree-holder between the date of his application for execution and rateable distribution and the date of actual distribution. (*Staples A. J. C.*)

GO-OPERATIVE SOCIETY, CENTRAL BANK, DARYAPUR vs. GANPAT.

31 N.L.R. 423.

Sec. 73 - Rateable distribution—execution petition adjourned on application by judgment-debtor—judgment debtor selling on due date—execution case if pending after that date—purchase by decree holder with leave to set off—effect on claim to rateable distribution—execution started after date of sale but before rateable distribution—right to participate in rateable distribution.

Plaintiff and defendant No. 1 held decrees against the same judgment-debtor. Defendant No. 1 applied to execute his decree on the 1st September 1924. On application by judgment-debtor the execution proceedings was adjourned and was dismissed on the 8th October. It was re-presented on the 10th October and the judgment-debtor was arrested on the 25th October, when he was given six months time for paying the debt, and the execution case was dismissed on the 19th December. The plaintiff in execution of his decree brought certain property belonging to the judgment-debtor to sale, and on the 24th November, the plaintiff was given permission to bid at the sale, although the execution case of the defendant

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No. 1 had not been finally disposed of. The sale was actually held on the 19th January 1925 and the decree-holder purchased the property himself and set off the price against his claim. The defendant No. 1 made an application for rateable distribution of his claim, and also put his other decree into execution applying at the same time for rateable distribution. The plaintiff contended that the execution of the defendant No. 1 was not pending and he was not entitled to rateable distribution.

Held, that the order of dismissal of the defendant No. 1's petition for execution was not a judicial order, but only an order for administration or statistical purposes. The giving of time merely postponed the issue of process by the Court and did not destroy or suspend the right of the decree-holder to apply for execution, which must in spite of the grant of time and in spite of the order of dismissal be deemed to have been pending, and the defendant was clearly entitled to rateable distribution. Consequently, when there was a valid application for rateable distribution pending, the plaintiff was not entitled to an order for set off, and he was bound to deposit the actual amount of his purchase. (*Pandurang Row J.*)

RAMANATHAN CHETTIAR vs. ALAGANAN CHETTIAR.

70 M.L.J. 683=1936 M.W.N. 223=43 M.L.W. 703=A.I.R. 1936 Mad. 1437=163 I.C. 209

Sec. 73(2) - Order rejecting decree-holder's application for rateable distribution, if appealable - Remedy of the decree-holder.

Where a Court holds that a decree-holder who has made an application for rateable distribution under Sec. 73, C. P. Code, is not entitled to share in the rateable distribution of assets, the order is final and is not appealable. If he is dissatisfied with the order he has his remedy by instituting a suit against other decree-holders for getting his share in the assets. (*Thom & Rachapat Sing JJ.*)

BEHARI LAL vs. ALI NABI.

1936 A.L.J. 559=1936 A.W.R. 489=A.I.R. 1936. All 626=162 I.C. 349

C. P. Code—(Contd.)

Sec. 73 & Or. 21, r. 53—Attachment of decree by several decree-holders before money due under decree deposited in Court—rateable distribution.

The operation of Sec. 73 of the C. P. Code, is attracted when several holders of decrees against a person attach a decree obtained by such person before the money due under the attached decree is deposited in Court, (*Nasim Ali & Edgley JJ.*)

JAGABANDHU ROY vs. JAGABANDHU SAHA SARDAR & ORS.

40 C.W.N. 1249.

Sec. 73 & Or. 21, r. 55—Scope and object-provisions of the Rule, if can be availed of by creditors who apply for rateable distribution after satisfaction of decree of attaching creditor.

Under Or. 21, r. 55 '1', C. P. Code, as amended by the Oudh Court, notice is required to be sent to the sale Officer of an application under Sec. 73 (1) of the Code for rateable distribution of assets. R 55 (2) (b) undoubtedly means that unless along with the decree of the attaching creditor, the decree of an applicant for rateable distribution is also satisfied, the attachment shall not be deemed to be withdrawn. In other words, the meaning is that the original attachment shall enure for the benefit of the decree-holder who has applied for rateable distribution of assets under Sec. 73, C.P. Code. This however does not and cannot mean that the attachment will enure for the benefit of even those who may apply for execution by rateable distribution of assets in future. (*Srivastava A. C. J. & Zia ul Hassan J.*)

BISMOHAN SINGH vs. JAGAT BAHADUR SINGH & ANR.

1936 O.W.N. 861 = 164 I.C. 1031.

Sec. 73 & Or. 33, rr. 10 & 13—Pauper suit—portion of Court-fee directed to be paid to Government by defendants—property of defendants sold in another proceeding—right of Government to recover Court-fee out of sale proceeds.

In a pauper suit, the defendants were directed to pay to the Government a portion of the Court-fee which would have

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been payable by the pauper plaintiff. Thereafter certain properties of the defendants having been sold in execution of another decree obtained by a third party, the Government applied that their claim for Court-fee in the pauper suit should be first satisfied out of the sale proceeds, in preference to the claim of the other decree-holder. Held, that the Government's dues for Court-fee being of the nature of a Crown debt was entitled to priority, and the Government could recover the Court-fee out of the sale proceeds. (*Varadachariar J.*)

VARADACHARI vs. SECY. OF STATE.

59 Mad. 872 = 70 M.L.J. 601 = 1936 M.W.N. 76 = 43 M.L.W. 725 = 162 I.C. 868 = A.I.R. 1936 Mad. 602.

Sec. 80—Secretary of State impleaded as proforma defendant—no relief sought against him—notice, if necessary.

Sec. 80, C. P. Code is clear and peremptory that notice must be served on the Secretary of State or on the public Officer as the case may be as a condition precedent to the institution of the suit. Therefore, even when no cause of action against the Secretary of State is alleged and no relief is sought against him, and he is simply impleaded as a proforma defendant, notice must be served on him in accordance with the provisions of Sec. 80 of the Code. (*Agarwalla & Varma JJ.*)

SECRETARY OF STATE vs. AMARNATH & ORS.

15 Pat. 353 = 17 P.L.T. 152 = 161 I.C. 690 = A.I.R. 1936 Pat. 339.

Sec 86—Section, if applies to proceedings under Secs. 184, 186 & 187, Companies Act.

Sec. 86, C. P. Code, does not apply to the proceedings under Sec. 184, Companies Act, but it is applicable to the proceedings under Secs. 18 & 187 of that Act. (*Sulaiman C. J. Thom & Iqbal Ahmed JJ.*)

OFFICIAL LIQUIDATORS, DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO. LTD., vs. PRESIDENT COUNCIL, OF REGISTRY, NABHA STATE.

1936 A.W.R. 1059 = 1936 A.L.J. 1134. = A.I.R. 1936. All 826.

C. P. Code—(Contd.)

Sec. 89—*Provisions of the section, if covers all references to arbitration.*

Sec. 89 C. P. Code covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow, (*Sale J.*)

SITARAM vs. HARBANSAL & ANR.

38 P.L.R. 102=160 I.C. 287=A.I.R. 1936 Lah 374.

Sec. 89 & Or. 23 r. 3—*Words "by any other law for the time being in force," if covers Or. 23, r. 3.*

The words "by any other law for the time being in force" in Sec. 89, C. P. Code must refer to some law extraneous to the Code of Civil Procedure, and cannot be legitimately held to cover Or. 23 r. 3 of the Code. Once Sec. 89, C. P. Code is held to apply, no reliance can be placed for any purpose, on Or. 23 r. 3 of the Code. The only remedy left, is either to proceed with the arbitration or, if the Court has superseded the arbitration, to proceed with the hearing of the appeal on the merits as required by para 8 of the 2nd Schedule read with para 19 (*Sale J.*)

SITARAM vs. HARBANSAL & ANR.

38 P.L.R. 102=160 I.C. 287=A.I.R. 1936 Lah 374.

Sec. 92—*Suit by a mohunt for declaration of his right to be the mohunt and for possession of properties from rival shebais—Sanction under the section, if necessary.*

A suit by the mohunt of an *Asthal* for a declaration that he is the rightly appointed mohunt of the *Asthal* and as such entitled to the properties thereof, without a prayer for the removal of the defendants from the office of the mohunt, is not a suit of the character contemplated by Sec. 92, C. P. Code, and the sanction of the Advocate-General or of the Collector is not therefore necessary for maintaining the suit, (*Mukherjee & S. K. Ghosh, JJ.*)

GOBINDA RAMANUJA DAS MOHUNT vs. RAM CHARAN RAMANUJ DAS.

63 Cal. 326=62 C.L.J. 153=164 I.C. 33.

C. P. Code—(Contd.)

Secs. 92 & 93—*Suit dismissed for defect in the sanction required, if may be restored to file.*

A suit dismissed for defect in the sanction required by Sec. 93, C. P. Code, may be restored to file under the provisions of Sec. 3 of the Public Suits Validation Act, and when so restored, it is to be proceeded with and tried apart from any question of fresh consent of the Collector. (*Mukherjee & S. K. Ghosh JJ.*)

BHABATARAN CHAKRAVARTY vs. RAM LAL DAS.

40 C.W.N. 722=63 C.L.J. 70=A.I.R. 1936, Cal. 815.

Sec. 94 & Or. 39 rr. 1 & 2—*Penalty prescribed in r. 2 (3) if applies to injunctions under r. 1.*

The drafting of r. (3) of Or. 39, C. P. Code, is somewhat inartistic but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. The penalty prescribed in that rule by way of detention in civil prison for committing a breach of an injunction applies to cases of injunctions issued under Or. 39, r. 1 also, though there is no specific provision to that effect in that rule. Generally speaking it applies alike to disobedience of all the injunctions issued under Sec. 94 of the Code. (*Macpherson & Mohammad Noor JJ.*)

JANG BHADUR SING vs. CHHABILA KOIRI.

15 Pat. 320=A.I.R. 1936 Pat. 23=160 I.C. 347=17 Pat. L. T. 61.

Sec. 100—*Order dismissing appeal from an order under Or. 21, r. 90, if open to second appeal.*

No second appeal lies against an order passed by the lower appellate Court dismissing an appeal from an order under Or. 21, r. 90, C. P. Code. 15 P. L. T. 743, 40 C. L. J. 311 & 47 Mad. 288 distinguished, (*Saunders J.*)

NAND KISHORE SINGH vs. NAGENDRA BALA DEBI.

17 P.L.T. 712.

Sec. 100—*Objection as to admission of irrelevant documents by the appellate Court*

C. P. Code—(Contd.)

if can be taken in second appeal, when not taken in the appellate Court.

Where the appellant did not raise any objection as to the irrelevancy of certain documents admitted by the appellate Court, nor did he deny that the documents contained a true and accurate statement of the contents of the original documents, but raised the objection in second appeal, *held*, that it was not open to him at that stage to raise the objection that the documents were illegally admitted, or that there was no evidence of the formality of comparing the originals. (*Agarwalla & Madan JJ.*)

CHHATRA KUMARI DEBI vs. MST. PARBATI KUER & ANR.

17 P.L.T. 709 = A.I.R. 1936 Pat. 600.

Sec. 100—*Finding that document has not been acted upon, if a finding of fact.*

A finding arrived at by the lower court to the effect that a certain document has not been acted upon, is a finding of fact, and therefore cannot be questioned in second appeal. (*Jai Lal J.*)

ALI GAUHAR vs. MOHAMMED.

38 P.L.R. 590.

Sec. 100—*Question whether transaction was intended to defeat and delay creditors, if can be raised in second appeal.*

A finding that a particular transaction was intended to defeat and delay the creditors and was collusive, is one of fact and therefore cannot be questioned in second appeal. (*Bhide J.*)

DAULATRAM vs. BISHEN DASS.

38 P.L.R. 577

Sec. 100—*Order allowing deposit and setting aside execution sale—second appeal if lies.*

No second appeal lies from an order of the Court allowing a deposit and setting aside a sale in execution under Or. 21, r. 92, C. P. Code. (*Wort J.*)

NASIRUDDIN HAIDAR vs. HAKIM MOHAMMAD TAHIR & ORS.

A.I.R. 1936 Pat. 119 = 161 I.C. 26

C. P. Code—(Contd.)

Sec. 100—*High Court if will interfere in second appeal when the question, involved is as to the legal effect of proved or admitted facts.*

In case of a certain proved or admitted fact a second appeal will lie on the ground that the lower appellate court has not properly appreciated the legal effect of certain proved or admitted facts. 11 Lah. 199 followed. (*Jaital & Sale JJ.*)

PARMODH CHAND vs. NARAIN SINGH.

A.I.R. 1936 Lah. 104 = 163 I.C. 81.

Sec. 100—*Suit for setting aside alienation by widow for raising money for litigation—Absence of finding as to whether extra funds were necessary—Finding, if one of fact.*

In a suit for setting aside an alienation made by a widow for the purpose of raising money for a litigation there was no clear finding by the Court as to whether the funds in the hands of the widow were insufficient to meet the expenses of litigation. *Held*, that the finding of the trial Court could not be said to be one of fact and therefore it could be challenged in second appeal. (*Rangilal, J.*)

OFFICIAL RECEIVER, DELHI vs. KISSEN LAL & ANR.

A.I.R. 1936 Lah. 98 = 161 I.C. 922.

Sec. 100—*Revenue Survey papers treated by first two courts as documents creating title—Absence of other materials on point—Finding of first appellate court as to effect of documents, if finding of fact binding in second appeal.*

Where the trial Court and the Court of first appeal had treated a revenue survey Khasra and a Nogra as documents which themselves created and embodied title and there were no other materials on the point, *held*, that the effect of the documents was a question of law—they being, because of the manner in which they had been regarded not merely historical materials but the direct foundation of rights—and therefore the finding as to their effect was not a find-

C. P. Code—(Contd.)

ing of a fact so as to be conclusive in second appeal. (*Sir George Rankin*.)

BALLAVDAS vs. NUR MOHAMMAD.

40 C.W.N. 449=38 P.L.R. 182=A.I.R. 1936 P.C. 83=160 I.C. 579=17 Pat. L.T. 177=1936 A.W.R. 317=1936 A.L.J. 480=43 M.L.W. 685=1936 O.W.N. 153=70 M.L.J. 455.

Sec. 100—Legal Necessity, if a question of fact.

The question as to whether there was legal necessity for the transaction is a question of fact, and cannot be raised in second appeal. (*Wort & Rowland JJ.*)

DARBAR SAHEB vs. BARE LAL KAND NATH.

17 P.L.T. 488=A.I.R. 1936 Pat. 275. =162 I.C. 797.

Sec. 100—Absence of jurisdiction to hear appeal, if a good ground for second appeal

The absence of jurisdiction to hear an appeal is a good ground for second appeal. So when District Judge entertained an appeal from the Court of first instance which by a notification issued under Sec. 39 (3), Punjab Courts Act lay to a Subordinate Judge, *held*, that the action of the District Judge in hearing the appeal was without jurisdiction, and the consent and acquiescence of the parties to the appeal could not give him jurisdiction, and his judgment and decree was liable to be set aside in second appeal. (*Addison & Abdul Basit JJ.*)

JIWAN & ORS vs. SANT SINGH & ANR.

A.I.R. 1936 Lah. 575.=164, I.C. 440=38 P.L.R. 990.

Sec. 100—Question whether new tenancy created if a question of law.

Whether a new tenancy has been created can never be said to be a pure question of law. It is a question of mixed fact and law and a question which certainly depends upon a principle of facts. (*Wort J.*)

MR. PUNA BIBI vs. KESHAB ROAJI THAKUR.

A.I.R. 1936 Pat. 411=163 I.C. 538.

C. P. Code—(Contd.)

Sec. 100—Findings of fact based on documents which are instruments of title, if can be challenged in second appeal.

A finding of fact based upon documents which are instruments of title and not merely historical material, can be challenged in second appeal, 57 I. A. 86 distinguished. (*King C. J. & Nanavatty J.*)

AMJAD HOSSAIN vs. NAWAB ALI.

1936 O.W.N. 160=160 I.C. 158=A.I.R. 1936 Oudh 225.

Sec. 100—Finding arrived at by misapplying the law if a finding of fact.

A finding which has been arrived at by misapplying the law, for example, by wrongly placing the burden of proof, is not a finding of fact only, but is a finding of mixed law and fact and as such can be set aside in second appeal. (*Dunkley J.*)

S. P. L. A. CHETTIAR FIRM vs. MA PU.

A.I.R. 1936 Rang. 262=163 I.C. 604.

Sec. 100—Prevalence of a particular practice and the length of its existence if questions of fact.

Whether a usual practice prevails or not in a particular place and the length of its existence are questions of fact, which cannot be reopened in second appeal, although the legal inferences which follow from them may be questions of law. 54 All. 6 followed. (*Vivian Bose J.*)

GANGADHAR MAROTI vs. SUNDAR NARAIN SANSTHAN, DHANORA & ORS.

I.L.R. 1936 Nag. 13=164, I.C. 825=A.I.R. 1936 Nag. 95.

Sec. 100—Findings based on "Khatauni" and "Khasra," if can be challenged in second appeal.

"Khatauni" and "Khasra" are instruments of title, and a finding based upon such documents can be challenged in second appeal, even if it is a finding of fact. (*Zia-ul-Hasan J.*)

GULAI vs. SRIPAL.

1936 O.W.N. 375=162, I.C. 334.

Sec. 100—Order disallowing costs, if open to second appeal.

C. P. Code—(Contd.)

The awarding of costs is a matter of discretion and therefore where the lower appellate court has in the exercise of its discretion refused to allow the same, the High Court will not interfere with the exercise of that discretion in second appeal. (*Srivastava & Nanavutty JJ.*)

SITALA BAKSH SINGH vs. MAHABIR PRASAD.

1936 O.W.N. 414=162. I.C. 229=
A.I.R. 1936. Oudh 275.

Sec. 100 (c)—Court of second appeal if can interfere where error or defect in Judgment of lower appellate Court not found.

Under Cl. c, of Sec. 100, C. P. Code, it is not sufficient to show that there was a defect in the procedure of the trial Court. It is necessary to show that the alleged defect in procedure may possibly have produced error or defect in the decision of the case upon the merits of the lower appellate Court. Where it is not found that there may have been any error or defect in the judgment of lower appellate Court from an error of procedure on the part of the trial Court, the Court of second appeal cannot interfere under Sec. 100 (c), C. P. Code. (*Sutaiman C. J. & Bennet J.*)

NANDAN SINGH & ORS. vs. PHUNESH SINGH & ANR.

1936 A.W.R. 1085.

Secs. 100 & 101—Question as to the existence of a partnership, if one of law allowing a second appeal.

In the absence of a partnership the question whether the relation of partners existed between the parties has to be inferred from the facts as to the manner in which the business in which the parties were concerned, was conducted and as to their relationship with one another in connection with that business. It is a legal conclusion to be drawn from the findings as to the simple facts, and the correct inference to be drawn from the proved facts, as to the relationship of the parties towards one another in the business must be a matter of law, which can be considered in second appeal. (*Dunkley J.*)

MA SIN vs. MAUNG BA HMU.

A.I.R. 1936 Rang 383=164 I.C. 1100

C. P. Code—(Contd.)

Sec. 102—Case covered by the section, if open to revision.

As a general rule, the Court is not in favour of entertaining revisions from the orders of the lower appellate courts in cases which are covered by Sec. 102, C. P. Code. These orders are intended by the legislature to be final, and to allow anything of the nature of an appeal against such orders would amount to circumventing the policy of the legislature. (*Agha Haidar J.*)

GIRDHARI LAL vs RATAM CHAND.

A.I.R. 1936 Lah. 293=165 I.C. 137.

Sec. 102—Second appeal if lies in a suit to recover the money value of bhaoli produce of trees.

A suit for the recovery of money value of bhaoli produce of some trees is not a suit for rent, and is not outside the jurisdiction of a Small Cause Court, and hence no second appeal lies in such a suit. 4 Rang. 503 & 98 Mad. 883 relied on. (*Varma J.*)

JHAKAR SAIHU vs. RAJ KUMAR TEWARI.

160 I.C. 186=17 P.L.T. 88=A.I.R. 1936. Pat. 102.

Sec. 104 (a)—Order rejecting objections to award and passing decree on it, if appealable.

An order rejecting objections made to an award and passing a decree in terms of the award is not appealable because, if such an appeal is preferred, it cannot be said to be an appeal from a decree nor can it be said to be an appeal under Sec. 104 cl. (a), C. P. Code, as that section only refers to orders superseded and not orders refusing to supersede. (*Baguley & Mosley, JJ.*)

MA NGWE vs. U, MIN SIN.

A.I.R. 1936 Rang. 240.=163. I.C. 590

Secs. 104 & 151—Order passed under Sec. 151, C. P. Code, if appealable.

So far as the Lahore High Court is concerned, no appeal lies from an order passed by a Court in the exercise of its inherent jurisdiction under Sec. 151, C. P. Code. (*Jailal J.*)

MAQHI MAL vs. L. GANPATRAI.

A.I.R. 1936 Lah. 213=163 I.C. 121=
38 P.L.R. 717

C. P. Code—(Contd)

Sec. 105 & Or 23, r. 3—*Order refusing to record adjustment, if can be challenged under Sec. 105.*

An order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuring that the merits of the case should be determined. It is not therefore open to an appellant to challenge such an order in appeal under S.c. 105, C. P. Code when it has not been appealed against. 6 Lah, 94, 51 Bom, 495, 53 All. 612 & 48 All. 75 relied on. (Pollock A. J. C.)

TATYA RAO vs. SRIKRISHNA LUXMI-NARAIN.

31 N.L.R. (Supp.) 72 = A.I.R. 1936 Nag. 8 = 160 I.C. 202.

Sec. 105 (1)—*Appeal by plaintiff—Death of plaintiff—application for substitution of names allowed though filed after 90 days after death—Case remanded for trial “de novo”—Appeal from remand order—Legality of order for substitution, if can be questioned in such appeal.*

Where during the pendency of a plaintiff's appeal in the lower appellate court, the plaintiff dies and the court allows an application for substitution of names to be made more than 90 days after the death, and later, the court passes a remand order sending the case back to the lower court for trial *de novo*, the defendant cannot in an appeal against the remand order, question the legality of the order for substitution of names. The proper stage for that would arrive when the decree itself is passed and is appealed from. (Harries & Bajpai JJ.)

ZAHOR MOHOMED KHAN vs. M. X. DE. NORONHA.

1936 A.W.R. 520 = 1936 A.I.J. 538 = 164. I.C. 730.

Secs. 109 (a) & 115—*Order passed in revision by High Court—leave to appeal, if can be granted.*

An order passed by the High Court in revision under Sec. 115, C. P. Code though it might have been made in the appellate side of the Court, cannot be regarded as an order made on appeal. In respect of such an order, therefore, the High Court has no jurisdiction to grant leave to appeal to the

C P Code—(Contd)

Privy Council under Sec. 109 (a) of the Code. (Wort A, C. J. & Dwyer J.)

KRISHNA CH. DEB vs. RAJENDRA NARAYAN BHANJ DEO.

15 Pat. 659 = 17 P.L.T. 760 = A.I.R. 1936 Pat. 465 = 164 I.C. 287.

Sec. 109 (c)—*Order removing name of pleader from roll of pleaders—case, if can be certified as fit for appeal to Privy Council.*

An order striking off the name of a pleader from the roll of pleaders on the ground of misconduct falls under Sec. 109 (c), C. P. Code, and if there are some points of law raised in the case, it can be certified as a fit one for appeal to his Majesty in Council. (Sulaiman C. J. & Bajpai J.)

PATESHRI PROSAD RAY vs. JUDGES OF THE ALLAHABAD HIGH COURT.

1936 A.W.R. 1007 = 1936. A.I.J. 1272.

Sec. 109 (c)—*Appeal to Privy Council Certificate when should be granted.*

The Court ought not to grant a certificate under Sec. 109 (c), C. P. Code, unless a point of law is involved in the appeal which is not only substantial and important as between the parties but is one of general importance or of such a nature that the decision upon it may govern numerous cases. (Page C. J. & Mya Bu, J.)

SEIN HTAUNG vs. V. E. A. CHETTIAR FIRM

14 Rang. 86 = 160. I.C. 724 = A.I.R. 1936 Rang. 65.

Sec. 109 (c) & 110—*Application for leave to appeal to Privy Council in two connected appeals—valuation of one appeal in excess of 10,000/ but that of other less—certificate of fitness, if can be granted in latter case.*

Two applications for leave to appeal to His Majesty in Council were filed from the decrees of the High Court in two appeals which were connected and heard together and disposed of practically by one judgment. The ground on which the Court proceeded was a common one. The value of the subject matter in dispute in one case was in excess of Rs. 10,000/- but that in the

C. P. Code—(Contd.)

other case was less. A preliminary objection was taken on behalf of the respondents that no leave could be granted in the latter case. *Held*, that as the point involved in the two appeals was a common one, it was a fit case for granting the certificate of fitness under Sec. 109 (c) although the requirements of Sec. 110 C. P. Code were not fulfilled. (*Sulaiman C. J. & Bennet J.*)

MUKANDI LAL vs. HASHMAT UN-NISSA

1936 A.W.R. 883=1936 A.L.J. 1025
A.I.R. 1936 All 832.

Sec. 546 & 110—Order of remand by High Court, if appealable to the Privy Council.

An order of the High Court, remanding execution proceeding to the Lower Court for re-decision is not appealable to the Privy Council, there being no final order. (*Addition & Abdul Rasid J.*)

SANKARDAS SADHURAM vs. GURBUX SINGH.

38 P.L.R. 112.

Secs. 109 & 11—Appeal to Privy Council—Judgment of High Court one of affirmance—circumstances in which appeal may lie.

A person applying for leave to appeal to the Privy Council, must show the judgment of the High Court is one of affirmance show that there was substantial question of law involved in the appeal, within the meaning of Sec. 110 C. P. Code. Where the appellate Court modifies the original decree upon a law point, and that completely in the applicant's favour the latter cannot because of that modification have a right to an appeal on other points on which the Courts have concurred, without showing a substantial question of law. 51 Cal. 969 & 38 C. W. N. 1171 followed; (*Wort A. C. J. & Dhayle J.*)

MAHABIR PRASAD vs. BRIJ MOHAN PRASAD & ANR.

15 Pat. 637=163 I.C. 139=17 Pat.
L.T. 802=A.I.R. 1936 Pat. 553.

Sec. 109 (a)—Order remitting issue for decision and leaving parties rights undetermined, if a final order.

C. P. Code—(Contd.)

An order of an appellate Court is not a "final order" within Sec. 109 (a), C. P. Code, unless it finally disposes of the rights of the parties in relation to the whole suit. An order by the appellate Court remitting an issue to the trial court for decision and leaving the rights of the parties yet undetermined, is not a final order within the meaning of Sec. 109 (a) of the Code. (*King C. J. & Zil-ul-Kassan J.*)

HUZUR ARA BEGUM vs. DEPUTY COMMISSIONER OF GONDA.

1936 O.W.N. 318=160 I.C. 811=
A.I.R. 1936 Oudh 205.

Sec. 110—Decree for mesne profits of suit property obtained in separate suit, if can be added to increase value in appeal.

In order to make up the prescribed valuation for an appeal to the Privy Council, it is not allowable to a party to add the amount of a decree for mesne profits of the property obtained in a separate suit. 39 mad. 843 & 37 I. A. 56 relied on. *Addition A. C. J. & Din Mohommed, J.*

BALRAJ vs. MT. MOHANTO.

A.I.R. 1936 Lah. 31=38. P.L.R. 767

Sec. 110—Appeal to Privy Council—duty of High Court in granting leave to satisfy itself as to the existence of a substantial question of law.

Under Sec. 110, C. P. Code, it is incumbent upon the Court in a case where the appellate decree affirms the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law fairly open to agreement and not merely an alleged question of law is involved in the case. (*Page C. J. & Bu U. J.*)

M. C. PATAIL & ANR. vs. H. G. ARIFF.

13 Rang. 744=161 I.C. 383=A.I.R.
1936 Rang. 125.

Sec. 110—Decree against four persons—decree affirmed with regard to three, but varied with regard to the other—single.

C. P. Code—(Contd.)

decree drawn up—appeal to Privy Council, if competent against person in whose decree not varied.

In a mortgage suit, a decree was passed against two defendants for the full amount claimed and against two others for part of the amount. On appeal, the decree against three of the defendants were confirmed, but against the fourth varied, making him liable for more than what the trial Court decreed. *Held*, that the fourth defendant was entitled to the costs of Privy Council, as the decree had been varied so far as he was concerned, but so far as the other defendants were concerned, it was only a decree of affirmance, and therefore the plaintiff could not appeal in regard to the decree passed against them, without showing a substantial question of law. 62 Cal. 257 & 31 C. W. N. 572 approved. (*Venkata Subha Rao & Cornish JJ.*)

VENKATASWAMI CHETTIAR vs. SEK-KUTTI PILLAI.

71 M.L.J. 580=1936 M.W.N. 1051=
A.I.R. 1936 Mad. 881=44 M.L.W.
533.

Sec. 110—Cross appeal—defendant's appeal allowed—plaintiff's appeal dismissed—plaintiff, is entitled to appeal as of right from decree dismissing his appeal.

A suit having been decreed in part and dismissed in part, cross appeals were filed in the High Court on behalf of the plaintiff and the defendant. The defendant's appeal was decreed and the decree of the Court below varied, but the plaintiff's appeal was dismissed. On an application for leave to appeal to the Privy Council against the decree dismissing the plaintiff's appeal, it was contended that inasmuch as the decree of the Court below had not been affirmed but had been varied in consequence of the defendant's appeal having been allowed, the plaintiff had a right of appeal to the Privy Council even as regards the decree dismissing the plaintiff's appeal. *Held*, that the decree against which the applicant proposed to appeal to the Privy Council affirmed the decision of the court below, and the applicant was not entitled to leave as of right. 16 A. L. J. 864 approved; 15 Cal. 969 ex-

C. P. Code—(Contd.)

plained. (Sulaiman C. J. Bennet & Niamatulla JJ.)

BENARES BANK LTD. AGRA vs. RAJ NATH KUNZRA & ORS.

57 All. 873=1935 A.W.R. 380=1935
A.L.J. 332=A.I.R. 1935 All. 374

Sec. 110 (2)—Leave to appeal to Privy Council.

The words in the second clause of Sec. 110 C. P. C. "Or the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value" are no doubt very wide but reference in this clause is to suits in existence and not to suits *gremio futuri*. There is nothing to support the contention that the second clause of Sec. 110 authorises an appeal to His Majesty's Privy Council in respect of property which no claim has ever been made, or in respect of which no question has ever arisen in any Court. (*King C. J. & Zia-Ul-Hasan. J.*)

MADHO PRASAD SINGH vs. SHER BAHADUR SINGH & ORS.

1936 O.W.N. 181=160 I.C. 799=A.I.R.
1936, Oudh. 181.

Sec. 111—Decision of single judge of High Court if appealable to His Majesty in Council.

When an application for leave to appeal to a Division Bench from a decision of a judge sitting singly is rejected, the decision remains a decision of a single judge, and therefore under Sec. 111, C. P. Code, no further appeal can be taken to the Privy Council. (*Wort & Rowland JJ.*)

PARAMESHWAR DYAL SINGH vs. BRINDABON OH. SARKAR.

17 Pat L.J. 173=A.I.R. 1936, Pat.
106=160 I.C. 150(I).

Sec. 115—Refusal to stay proceedings under Sec. 110 C. P. C.—High Court, if may interfere in revision.

An order refusing to stay proceedings under Sec. 10 C. P. Code, is an interlocutory one, and therefore is not open to revision by

C. P. Code—(Contd.)

the High Court under Sec. 115 of the Code, 144 I. C. 107 & 13 Lah. 59 distinguished : 15 Lah. 188 relied on. (*Bhide J.*)

DURGADAS GOVIND SINGH.

A.I.R. 1936 Lah. 569 = 165 I.C. 131.

Sec. 115—*Order refusing to extend time under Sec. 5, Limitation Act, if open to revision.*

If an appellate Court refuses to extend time under Sec. 5, Limitation Act in a case in which justice obviously demands an extension, there is an error in the exercise of jurisdiction justifying interference by the High Court in revision. (*Coldstream J.*)

MANI SINGH vs. ANAND PARKASH.

38 P.L.R. 903 = A.I.R. 1936 Lah. 693.
165 I.C. 516.

Sec. 115—*Party having other remedies if may seek revision by High Court.*

Where a party to a civil proceeding applies to the High Court for the exercise of its revisional powers under Sec. 115, C.P. Code, he must satisfy that Court that he has no other remedy open to set right what he alleges to have been done illegally, irregularly or without jurisdiction by the original trying Court, 11 All. 383 & 15 All. 405 relied on. (*Mackney J.*)

BANK OF CHETTINAD vs. MAUNG PO LU.

A.I.R. 1936 Rang. 12 = 161 I.C. 258.

Sec. 115—*Suit brought at a certain place in violation of contract between parties—Lower Court holding that it has jurisdiction, trying the suit on merits—High Court if should interfere in revision.*

When there are two Courts, both of which would normally have jurisdiction to try the suits, the parties should be allowed to agree among themselves that the suit should be brought in any one of these two Courts. The object of parties entering into a contract of this nature is to afford facility or convenience either to both the parties or to one of the parties, and it is unfair that any one of the parties should renege from the contract entailing hardship and inconvenience to the other party. At the same time

C. P. Code—(Contd.)

it is a common ground that the other Court also has jurisdiction, and where it is found that the Court below holding that it had jurisdiction, has tried the merits of the case between the proper parties, it would not be proper for the High Court to interfere in revision. (*Bajpai J.*)

GOPAL DAS AGARWALLA vs. HARI KISHAN DAS.

1936 A.L.J. 704 = 1936 A.W.R. 591
= A.I.R. 1936 AH. 514 = 163 I.C. 919.

Sec. 115—*Wrong construction of document—interference by High Court if justified*

The High Court has jurisdiction to interfere in revision with the decree of an appellate Court, on the ground that the lower Court had put a construction on a document, which it could not possibly bear. (*Jai Lal J.*)

RAM LABHAYA vs. FATEH ALI.

38 P.L.R. 348 = 164 I.C. 838 = A.I.R. 1936 Lah. 801.

Sec. 115—*Revision application made after 90 days—delay when may be condoned.*

Interference in revision being discretionary, the practice of the Court is to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay, in case the application is made more than ninety days after the passing of the order. Delay on the ground that the applicant was not a party to any of the orders which he sought to revise, and they were all passed behind his back and without notice to him is excusable and should be condoned. (*Srivastava & Nanavutty JJ.*)

BIRENDRA BIKRAM SINGH vs. BASDEO.

1936 O.W.N. 262 = 161 I.C. 814 = A.I.R. 1936 Oudh. 135.

Sec. 115—*Erroneous question of law—High Court, if can interfere in revision.*

If a judge assumes jurisdiction of a matter and proceeds to decide a question of law, however erroneous the decision may be, the High Court cannot interfere.

C. P. Code—(Contd.)

But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in the case of this kind is certainly revisable by the High Court. 22 C.W.N. 50 relied on. (*Wort J.*)

NASIRUDDIN HAIDAR vs. HAKIM MOHAMMAD TAHIR.

A.I.R. 1936 Pat. 119 = 161 I.C. 26.

Sec. 115—Order superseding reference to arbitration, if open to revision.

The reference to arbitration is a branch or ramification of the main suit which has to be disposed of subsequently, whatever the result of the reference may be, and the order making the reference is in the nature of an interlocutory order. An order superseding the reference is likewise an interlocutory order, and is further an order made by the Court in the exercise of its inherent powers; such an order is therefore not open to revision by the High Court. 14 Lah. 715 & 5 Lah. 238 followed; 36 All. 354 relied on (*Agha Haider J.*)

GULAB SINGH JOHRI MAL vs. DHARAMPAL DALIP SINGH.

38 P.L.R. 121 = A.I.R. 1936 Lah 538 = 160 I.C. 1052.

Sec. 115—Finding regarding competence to sue, if open to revision.

Sec. 115, C. P. Code clearly refers in cls. a) & (b) to jurisdiction. A finding that a party is not competent to sue cannot be held to be a finding affecting the Court's jurisdiction and therefore such a finding cannot be challenged in revisional proceedings under Sec. 115 C.P. Code. (*Blacker, J.*)

LORINDA RAM vs. BHOWANI MAL.

38 P.L.R. 315 = 165 I.C. 278 = A.I.R. 1936 Lah. 783.

Sec. 115—Order restoring certain proceedings and order refusing to grant review of the same, if open to revision by the High Court

During the pendency of an appeal against a final decree for partition, the appellant obtained from the Court, an injunction restraining the respondents from

C. P. Code—(Contd.)

building on the portions of the land allotted to the different co-sharers. Subsequently the appellant himself applied for demarcation of certain properties with a view to building thereon, and a Commissioner was appointed for the purpose. The respondent who had also made a similar application raised objections to the application made by the appellant, which was later dismissed for default. Thereafter the appellant died and the appeal abated. The respondent thereupon applied for revival of the proceedings which were restored to the file. An application for review of this order was dismissed. *Held*, that the order restoring the previous proceedings and the order refusing review of the order of restoration related to an application for restoration of proceedings dismissed in default and constituted a 'case' within the meaning of Sec. 115, C. P. Code. (*Bhide J.*)

MUHAMMAD SADIQ vs. MSST. SAMI-UL-NISA.

181 I.C. 212 = A.I.R. 1936 Lah. 618.

Sec. 115(c)—Test for applicability of the clause—decision as starting point of limitation if open to revision.

Cl. (c) of Sec. 115, C. P. Code, cannot be invoked where a question of jurisdiction is not involved or at least a question of procedure. e.g., proceeding in the absence of a necessary party to the suit. The defect must be something independent of the decision itself; an irregularity or illegality in the manner of arriving at it, not in the conclusion reached. A good working test would appear to be this, if the decision had been the other way, would the illegality still be there? If not, the flaw must be in the decision and not in the manner in which it is reached. Consequently, it would not be revisable. It is possible that this test would not work in every case, but where it does, it is decisive. Applying this test, it is clear that a decision on the question of limitation, or the character of the suit or the starting point of limitation is not revisable under Sec. 115, C. P. Code. (*Vivian Bose J.*)

DEVIDAS MAROTI vs. NILKANTH RAO NARAYANRAO.

I.L.R. 1936 Nag. 73 = 164 I.C. 848 = A.I.R. 1936 Nag. 157.

C. P. Code—(Contd.)

Secs. 115 & 104 & Or. 43. r. 1—
Dismissal of execution case for non-prosecution—order if appealable

An order of dismissal of an execution case for non-prosecution, does not fall within the scope of those sections of the C. P. Code, which relate to appealable orders, and in no circumstances can such an order be said to be a decree. It is from its very nature an order for dismissal for default, which is open to revision. (*S. K. Ghosh & Edgely JJ.*)

AMARENDRA NATH MULLICK vs.
BALAI CHAND GHATAK.

A.I.R. 1936 Cal. 267 = 162 I.C. 777.

Secs. 115 & 151—Scope of the two sections.

Sec. 115, C. P. Code, does not in terms confer any inherent jurisdiction on the Courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Ordinarily the preservation of the inherent power would not enable courts to extend the scope of powers specifically conferred upon them by other provisions of the C. P. Code, and Sec 151 should not be utilised so as to make it supplementary to Sec. 115. The inherent powers which can be exercised by a superior Court are ordinarily such powers as are necessary to exercise in relation to proceedings pending before it. (*Sulaiman C. J., Niamatullah & Rakhpal Singh JJ.*)

MUKUND LAL vs. GAYA PRASAD & ORS.

57 All. 977 = 156 I.C. 805.

Sec. 115 & Or. 6. r. 17—Order refusing to allow amendment of pleading, if open to revision.

An order refusing to allow an amendment of a pleading is not open to revision by the High Court. (*Sulaiman C. J., Bennet & Bajpai JJ.*)

SURAJ PALI vs. ARIYA PRATINIDHI SARHA, U. P.

1936 A.W.R. 776 = 1936 A.L.J. 923 = 165 I.C. 1 = A.I.R. 1936 All. 686

C. P. Code—(Contd.)

Secs. 115 & Or. 7. r. 11—High Court when can interfere in revision on a question of court-fee.

The High Court will interfere in revision on a question of court-fee only where no other remedy is available to the aggrieved party and where irreparable loss would be caused if the High Court did not interfere at that stage. (*Macpherson J.*)

MAHAHIR PRASAD SARAOJI vs. MT. JAIDAYI BIBI & ORS.

16 P.L.T. 889.

Sec. 115 & Or. 7. r. 11.—Interlocutory order on question of court-fee, if may be interfered with, in revision.

The High Court will not ordinarily interfere in revision, with an interlocutory order deciding a question of court-fee unless such order would result in irreparable injury to one or the other of the litigant parties. The High Court will therefore not interfere with an order by the lower court allowing a suit to proceed on insufficient court-fee, because, such an order does not injure any party. (*Agarwala & Varma JJ.*)

RAGHUNANDAN GIR vs. DEORAJ.

15 Pat. 340 = 17 P.L.T. 9 = A.I.R. 1936 Pat. 85 = 161 I.C. 22.

Sec. 115 & Or. 21. r. 52—Jurisdiction of custody court to decide question of priority—Decision of such Court, if open to revision.

The custody Court has jurisdiction to decide the right of a party to any priority, and any decision arrived at by such Court even if erroneous in law is not open to revision by the High Court, because, firstly there is no want of jurisdiction or illegal exercise of jurisdiction, and secondly, because the petitioner has a remedy by way of a regular suit. 19 Cal. 286, 16 Bom. 577, 44 Cal. 1072 & 54 Bom. 667 relied on; 44 Mad 100 distinguished. (*Addison & Abdul Rashid JJ.*)

SIMLA BANKING & INDUSTRIAL CO. LTD. vs. DITTU MAL HARDIAL & ORS.

38 P.L.R. 800 = A.I.R. 1936 Lah. 521. 163. I.C. 584.

C. P. Code—(Contd.)

Sec. 115 & Or. 21, rr. 60 & 63—
Order under Or. 21, r. 60 if open to revision.

It being a general principle that an application under Sec. 115, C. P. Code, will not ordinarily be entertained when there is another certain and conclusive remedy open to the aggrieved party, no application in revision can be entertained against an order made under Or. 21, r. 60 or 61, although no appeal lies from it, unless it can be shown that the Judge who made the order had failed to exercise the jurisdiction vested in him by rr. 60-63 of Or. 21. Where the Court has so failed to exercise jurisdiction its order is open to revision, but, ordinarily a party against whom an order under Or. 21, r. 60, is passed, cannot apply for revision of that order, because he has a special remedy by way of suit under Or. 21, r. 63. (*Dunkley, J.*)

VEDNATH SING & ANR. vs. U BA DIN.

14. Rang. 516 = A.I.R. 1936 Rang. 306.
= 164. I.C. 633

Sec. 115 & Sch. II, para. 14—
Order setting aside award, if open to revision,

No revision lies from an order setting aside an award passed by Arbitrators while the case still remains pending in the Courts below. 5 All. 293, 47 All. 121 & 47 All. 916 relied on; 24 A. L. J. 35 distinguished. (*Sulaiman C. J. & Bajpai J.*)

TULSIRAM vs. BRINDABAN DAS.

1936 A.W.R. 487 = 1936 A.L.J. 547 =
I.C. 722.

Sec. 141—Proceedings—what does the term include.

The proceedings spoken of in Sec. 141, C. P. Code include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions. (*Adilson & Abdul Rashid JJ.*)

RUP LAL vs. MANOHOR LAL.

A.I.R. 1936 Lah. 863 = 38 P.L.R. 973.

Sec. 144—Application under Sec. 144.
if one for execution. — — — — —

An application under Sec. 144, C. P. Code, being in substance one made for

C. P. Code—(Contd.)

seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree passed in appeal. (*Srivastava & Nanavutty JJ.*)

BIRENDRA BIKRAM SINGH vs. BASDEO.

1936 O.W.N. 262 = 160. I.C. 814 =
A.I.R. 1936 Oudh 185.

Sec. 144—Restitution—Right of auction-purchaser.

The right of the auction-purchaser to a refund of the money paid by him arises under Sec. 144, C. P. Code, and also on principles of equity and justice. Where the case does not come under Sec. 144, the Court may exercise its inherent jurisdiction to direct a refund of the money paid by the auction-purchaser to him. (*Jailat J.*)

RANBIR SEN vs. NOHAMMAD DIN.

A.I.R. 1936 Lah. 497.

Sec. 144—Land farmed out in satisfaction of decree—suit for declaration that land ancestral and not alienable in satisfaction of decree—suit decreed—claim for mesne-profits of may be made in execution of the decree.

The plaintiffs sued for possession of certain lands which had been farmed out by their father to the defendants in satisfaction of a decree held by the latter, on having it declared that the lands were ancestral and therefore could not be alienated to satisfy the decree. The plaintiffs having obtained a decree applied for execution of the same and claimed that they should be awarded mesne profits for the period during which the judgment-debtors remained in possession of the land under the farms and the amount due should be collected in the course of execution proceedings by way of restitution. *Held*, that Sec. 144, C. P. Code could not be applied to the case, and the claim for mesne profits could not be entertained in the execution proceedings. If the decree-holders considered themselves to have any claim to mesne profits, they should have made it a part of their claim in the suit, or should have made them the subject of a separate suit. (*Beckett J.*)

HARCHAND SINGH vs. SALEKH CHAND.

38 P.L.R. 373.

C. P. Code—(Contd)**Sec. 145—Supardar, liability of.**

A supardar is liable as a surety under Sec. 145 C. P. Code. It is the duty of a supardar to obtain instructions of the Court before handing over properties which had been placed under his charge. He cannot exclude himself from the liability imposed on him on the ground that he in good faith handed over the property to a third person, (*Sullaiman C. J. & Bennet J.*)

GENDA MALL vs. SUKHDARSAN LAL.

1936 A.I.J. 736=1936 A.W.R. 531=
164. I.C. 200=A.I.R. 1936 All. 555.

Sec 145—Decree if may be executed against surety when name not mentioned in decree.

Where a person become liable as surety for the performance of any decree or part thereof, the decree may be executed against him, to the extent to which he has rendered himself personally liable, in the manner provided for the execution of decrees, Sec. 145. C. P. Code does not provide that before the decree can be executed against the surety, he should be named as a judgment debtor in it, or even that the decree should provide for his liability as a surety or that it should contain a direction against a surety to pay the amount of the decree. (*Jai Lal & J.*)

PARKASH CHAND MAHAJAN vs. MADAN THEATRES LTD.

A.I.R. 1936 Lah. 463,=164. I.C. 281
=38 P.L.R. 623.

Sec. 145, & Or. 32, r. 6—Sum due to minor plaintiff deposited in Court—money withdrawn by guardian or a third person hypothecating immovable property as security—bond assigned to plaintiff by District Munsiff—suit against the person executing bond, if maintainable.

A certain sum was paid into Court as due to the plaintiff, who was then a minor represented by guardian. The guardian was allowed to withdraw the amount on the first defendant executing a bond in favour of the Munsiff undertaking that the money should be paid to the plaintiff

C. P. Code—(Contd)

by the guardian in due course. Later, the first defendant sold the hypothecated property to the second defendant. The plaintiff on attaining majority brought a suit against the two defendants to enforce the bond which had been duly assigned to him by the District Munsiff. Objection having been taken that the suit was not maintainable, held, that the bond carried a personal liability on the part of the first defendant, and having been given in pursuance of an order made under Or. 32, r. 6, C. P. Code, a suit was the proper means of enforcing it. Such a bond being for the protection of the minor's interest against his guardian could not be enforced by execution in the manner provided by Sec. 145, C. P. Code. (*Cornish J.*)

PULAVARTI SATY-AM vs. KUNCHI-BHOTLA SATYANARAYANA.

71 M.L.J. 675=1936 M.W.N. 1127=44
M.L.W. 621=A.I.R. 1936 Mad. 953.

Sec 145 & Or. 38, r. 5—Security for prospective decretal amount, if nullity—Surety executing security bond for such amount, if may set up invalidity of bond in execution proceedings.

When on an application for attachment before judgment, the Court demands and takes from the judgment-debtor security, not for production of the thing sought to be attached, but for the prospective decretal amount, the taking of such security is irregular but it is not a nullity. Consequently, a surety having executed a surety bond for payment of a stated sum in order to cover the decree that might be passed, as a result whereof the order for attachment before judgment was withdrawn cannot object in proceedings in execution that the security bond is inadmissible being in excess of the powers of the Court under Or. 38, r. 5, C. P. Code, (*R. C. Mitter J.*)

AMULYA RATAN SADHUKHAN vs. PRASAD CHANDRA KAR.

40. C.W.N. 657=A.I.R. 1936 Cal.143
=162 I.C. 619.

Sec. 148 & Or. 7, r. 11(c)—Time for paying deficit Court fees, if may be extended—Court's power to depart from general provisions

C. P. Code—(Contd.)

The plaintiff's suit was originally registered as an ordinary suit, valued at Rs. 5,000/-. On the defendant's written statement being filed, the Court decided the question of valuation, and enhanced the same to Rs. 75,000/-. The plaintiff was called upon to pay the deficit Court fees, and time was extended twice for the purpose. The plaintiff then applied for permission to sue as a pauper, which was rejected and the suit was dismissed for default in paying the deficit Court-fees. *Held*, that in view of Sec. 148 of the Code, the time granted for payment of deficit Court-fees may be enlarged from time to time, even after the expiry of the period originally fixed. The mandatory provision contained in Or. 7, r. 11, of the Code is intended for cases where no other complications intervene and that in a case of the present nature the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. (*Mukherji & S. K. Ghosh JJ.*)

MAHAMMAD FATEH NASIB vs,
SARADINDU MUKHERJI.

40 C.W.N. 747 = A.I.R. 1936 Cal. 221
= 162 I.C. 689.

Sec. 149—Inability to procure funds because of famine conditions, if sufficient ground for extension of time to pay court fees.

The rule that inability to procure funds is not a sufficient ground for extension of time under Sec. 149, C. P. Code, for payment of deficit court fees has reference to normal conditions, but is subject to an exception in cases where an acute famine is prevailing in the area where the appellant lives and where the sources of his income lie. (*D. N. Mitter & S. K. Ghosh JJ.*)

SURESH CH. SARKAR vs. GOSTA
BEHARI DUTTA.

40 C.W.N. 1294.

Sec. 149—Deficient court-fee paid due to a bonafide mistake—Deficiency, if should be allowed to be made good.

A suit was valued at Rs. 1,500/- but on an objection being taken by the defendant, the valuation was increased to Rs. 2,000/- on the orders of the Court. The suit was

C. P. Code—(Contd.)

decreed. In an appeal by the defendant, court-fee was paid on Rs. 1,500, that being the value shown in the copies supplied to the applicant. The District Judge dismissed the appeal on the ground that the deficient court-fee paid was due to gross negligence. On appeal to the High Court, *held*, that the mistake on the part of the pleader was a bonafide one, and therefore the lower appellate Court should have allowed the deficiency in court-fee to be made good. (*Addison A. C. J. & Din Mohammed J.*)

GAHRA & ANR. vs. MT. PANAH BIBI.
38 P.L.R. 262.

Sec. 149—Plaint presented within limitation, but insufficiently stamped—deficiency made up after limitation—deficiency accepted by Court—Court if must be deemed to have extended the time.

A plaint was presented on the 20th August to the judge personally at 9 p.m. When it was presented it did not bear the requisite Court-fee stamp but it was accompanied by an application for an extension of time for the payment of Court-fee. The limitation for the suit expired 21st August. No express order from the judge granting time to make up the deficiency in Court-fee was obtained but the same was made good in a day or two and accepted by the Court. At the trial it was contended that the suit was barred by limitation. *Held*, that the suit was in time. The plaint having been presented within time, the Court was competent to extend the time under Sec. 149, C. P. Code, and the Court must be deemed to have done so by accepting the Court-fee on a subsequent date (*Jai Lal J.*)

HIRA LAL vs. Mst. FAYAZ KHANAM.
38 P.L.R. 445.

Sec. 149—Decree directing payment of additional court-fee within certain time—Extension of time on application within fixed period.

Where the Court passed a decree that the plaintiff's suit would be decreed on payment of certain deficit court-fee within a time fixed by the decree and also directed that in default the suit would stand dismissed, but before the expiry of the period

C. P. Code—(Contd.)

fixed, on application by the plaintiff the Court extended the time for payment of court-fees, *held*, that under Sec. 149 of the C. P. Code, the Court had jurisdiction to do so. (*Nasim Ali & Henderson, JJ.*)

RAMESH CHANDRA TALUKDAR vs. PRAMATHA NATH SANYAL.

162 I.C. 522 = 63 C.L.J. 591.

Sec. 151—Scope and object of.

It is a mistake to suppose that Sec. 151, C. P. Code confers any special jurisdiction on civil courts. It merely a saving clause which saves inherent power of the court, which may exist independently of that section, from being limited by the provisions of the Code. (*Sullaiman C. J. & Bennef J.*)

GENDA MALL vs. SUKHDARSHAN LALL.

1936 A.L.J. 736 = 1936 A.W.R. 531 = 164 I.C. 200 = A.I.R. 1936 All. 555.

Sec. 151—Inherent powers of the Court—limits of.

The inherent powers prescribed by Sec. 151 of the Civil Procedure Code are not limited by the Code, but where there is an express provision in the Code for dealing with certain matter, the inherent powers of the Court should not always be invoked on failure of such provision. (*S. K. Ghosh J.*)

SHIRAZUL HAQUE vs. KASHIM ALI KHAIRATI.

62 C.L.J. 268.

Sec. 151—Application under the section, if maintainable when another remedy open.

When a remedy has been provided by law, it is not open to a party to resort to the inherent jurisdiction of the Court under Section 151 of the C. P. Code. (*Bhide J.*)

LADHA RAM vs. BARKAT ALI.

38 P.L.R. 868 = A.I.R. 1936 Lah. 672 = 165 I.C. 661.

Sec. 151—Suit if barred where remedy by application provided.**C.P. Code—(Contd.)**

Where the legislature has provided a procedure of a summary nature by application without expressly barring any suit in that behalf, it is always within the power of the Court under Sec. 151 C. P. Code, to treat a suit which has been filed instead of an application which is prescribed for the matter, as an application, and dispose it off accordingly. (*Jack J.*)

MOHAMMAD SIDDIQ AHMED vs. KARAM ALI KHAN,

A.I.R. 1936 Cal. 280 = 163 I.C. 578.

Sec. 151—Application for vacating order, if can be made under the provisions of this section when the order is open to appeal or review.

When an order passed by the trial Court is open to review by the Court or to appeal, it is not competent to the Court to entertain an application under Sec. 151 C. P. Code for the purpose of having that order vacated. (*Jailal, J.*)

LEHNA SINGH vs. MT. JASSI.

38 P.L.R. 331.

Sec. 151—Application stated by applicant to be one under Sec. 151—Court if must treat it as such.

The mere fact that an application is headed as one under Sec. 151, C. P. Code is not conclusive of the fact that it is so. Applications are very often drawn by clerks of pleaders who quote Sec. 151, C. P. Code, in the heading indiscriminately and almost as a matter of course. The Courts must therefore look to the substance of the application and not to mere mechanical quotation of the section, in order to do substantial justice between the parties. (*Agha Haider J.*)

BUR SINGH vs. ANJUMAN DEBI SOHAL.

161 I.C. 21 = A.I.R. 1936 Lah. 725.

Sec 151—Order under the section if appealable.

So far as the Lahore High Court is concerned, it has been consistently held that no appeal is competent from an

C. P. Code—(Contd.)

order passed by a Court in exercise of its inherent jurisdiction under Sec. 151, C. P. Code. (*Jailal, J.*)

MAGHI MAL vs. GANAPAT RAI.

38 P.L.R., 717=163 I.C. 121=A.I.R. 1936 L.Ah. 217.

Sec. 151—Refund of Court-fees—*cannot be ordered apart from powers given by Court-fees Act—Court's inherent powers must be exercised with caution.*

The Court has no jurisdiction in the exercise of its inherent powers or otherwise than any therein prescribed to order that the Court-fee chargeable and paid shall be refunded to a litigant. When however no specific rule or provision of law is applicable in the particular circumstances of the case, the Court can according to equity, justice and good conscience, exercise its inherent powers but in such a way as it does not conflict with the intention of the legislatures. If the Court does not possess jurisdiction to pass the order that the excess court fee be refunded, it is not the duty or function of the Court to issue a recommendation for the purpose of enabling a litigant to present a memorial *ad miser cordiam* to the revenue authorities. 40 C.W.N. 309 & 4 Rang. 66 followed. (*Page C. J. Mosely & Ba U J.*)

V. K. P. CHOKKALINGAM AMBALAM vs. MAUNG TIN & ORS.

14 Rang. 173=A.I.R. 1936 Rang. 208=163 I.C. 340.

Sec. 151—Property wrongly described in sale certificate—Court, if has power to amend the certificate.

Where a certain property purchased in execution of a mortgage decree was described in the sale certificate as being situated in one Mahal only, while as a matter of fact, it was situated in two Mahals and the purchaser applied for correcting the error, *held*, that the Court had power under Sec. 151, C. P. Code to amend the sale-certificate so as to describe the property in detail specifying the property of each of the two Mahals separately. (*Zia-ul-Hassan J.*)

SURAJDIN vs. RAMPROSAD SINGH.

1936 O.W.N. 575=162 I.C. 233.

C. P. Code—(Contd.)

Sec. 151—Application under Or. 21 r. 58 C. P. C.—Court ordering information to be sent to decree-holder but information not sent—Order passed by Court in absence of decree-holder, if can be recalled.

A judicial order which may affect or prejudices any party cannot be finally made unless he has been afforded an opportunity to be heard; and if such an order is made *ex parte*, that is to say, without notice to the opposite party, it is liable to be revoked at the instance of any part prejudiced thereby. Where in an application made by a stranger under Or. 21, r. 58, the Court ordered that the decree-holder should be informed of the application and of the date fixed for the hearing of the same, but the order was not communicated to the decree-holder, and as a result the application was heard *ex parte* and orders passed by the Court, *held*, that since the ignorance of the decree-holder was due to the default of the officers of the Court, the Judge had power to recall the order made by him in exercise of his inherent powers under Sec. 151, C. P. C. (*James J.*)

MOHARMONI KAUR vs. BHAN KUMAR CHAND & ANR.

161 I.C. 933=A.I.R. 1936 Pat. 176.

Sec. 151 & Or. 6, rr. 1 & 4—Particulars of statements in a petition or affidavit, if may be allowed.

The Court has inherent jurisdiction to interfere and direct particulars of a petition or affidavit to be furnished if it considers that a litigant will be substantially embarrassed owing to lack of precision therein. Failure to answer such particulars will prevent new matters, *viz.* which could have been incorporated in the petition or furnished by way of particulars, from being raised in an affidavit in reply. (*Panckridge J.*)

SITARAM PODDAR vs. HARIHAR PODDAR.

40 C.W.N. 913=165 I.C. 24.

Sec. 151 & Or. 9, r. 8—Power of Court to restore suit dismissed for default by mistake of Court.

A Court has inherent jurisdiction to restore a suit, dismissed for default owing

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to mistake of the Court itself. Where therefore a suit had been dismissed for the plaintiff's failure to attend on a certain date, and it appeared that that date had been fixed merely for filing objections against the report of the Commissioner appointed in pursuance of the preliminary decree, held, that the suit was liable to be restored. (*Tek Chand J.*)

DHANPAT RAI vs. BADRI DASS & ANR.
A.I.R 1936 Lab. 759.

Sec. 151 & Or. 9 r. 13—*Court if can restore a suit in exercise of its powers under Sec. 151 when it has already refused to do so in an application under Or. 9 r. 13.*

In an application under Or. 9, r. 13, G.P. Code, when the Court finds that the fact of the applicant being prevented by sufficient cause from appearing has not been proved, it cannot again exercise its inherent powers under Sec. 151 of the Code and restore the suit. (*S. K. Ghose J.*)

SHIRAZUL HAQUE vs. KASHIM ALI KHAIRATI.

62 C.L.J. 268.

Secs. 151 & Or. 47, r. 1—*Application for execution by next friend of minor—adjustment of decree subsequently effected by next friend of minor—order recording adjustment, if can be vacated on application by next friend of minor—separate suit, if necessary.*

During the pendency of proceedings in execution of a decree obtained by a minor, his next friend consented to an adjustment of the decree on certain terms, and the Court thereupon passed an order recording the adjustment. Subsequently, the next friend applied for vacating that order on the ground of fraud, etc. It was contended by the judgment-debtor that the proper remedy for the decree-holder was by way of a separate suit. Held, that the application was maintainable and it was not necessary for the next friend to resort to a separate suit, the proper remedy being by way of review or by invoking the inherent

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jurisdiction of the Court. (*Varma & Rowland JJ.*)

LAL BABU vs. RANG BAHADUR SINGH.
17 P.L.T. 743 = A.I.R. 1936 Pat. 506 = 165 I.C. 857.

Or. 1, R. 1—*Joinder of action by different plaintiffs against same defendant—when may be allowed.*

Defendant was the agent of H & G, appointed at different times and by different acts, for the purpose of managing the joint properties of the two plaintiffs. In a suit for accounts by the two sets of plaintiffs jointly against the defendant, Held, that having regard to the fact that some common questions of fact and law were bound to arise, the plaintiffs could join their causes of action in the same suit, and there would be no misjoinder of parties or causes of action. (*R. C. Mitter J.*)

MONINDRA LAL CHATTERJI vs. HARI-PADA GHOSH,

41 C.W.N. 27 = A.I.R 1936. C.L. 650.

Or. 1, r. 3—*Suit against Karta of Hindu Joint Family—no mention in plaint as such—other members not joined—decree if liable to be set aside.*

It is quite unnecessary for a plaintiff, in an action in which he wishes to obtain a decree binding upon the joint family property to state in his pleadings that he is suing the defendant as the Karta of the family. If the plaintiff sues the Karta of the family without mentioning the other members of the family and without joining them as parties to the suit he may obtain a decree which decree is not liable to be set aside merely because the other members of the family were not joined. But in the circumstances the other members are entitled to have an opportunity in a suit of their own to raise the question of whether the decree and its execution binds the joint family property. (*Wort J.*)

MUKHRAM MAHTO vs. KESO PROSAD SINGH BAHADUR.

A.I.R 1936 Pat. 258 = 162 I.C. 879.

Or. 1, r. 3—*Suit for recovery of possession of land—Defendant claiming posses-*

C. P. Code—(Contd.)

sion as tenant of another person—Predecessor-in-title of such person, if a proper party.

Where in a suit for recovery of possession of a piece of land, the defendant, claims to be in possession of the land as a tenant of another person, such person may be a proper party to the suit, but his predecessor-in-title can never be a proper party to the suit. An order directing him to be impleaded in the suit must therefore be illegal. (*Baguley J.*)

N E S P A CHETTIAR FIRM vs. LETCHMANAN KONAN.

A.I.R. 1936 Rang. 241 = 163 I.C. 630.

Or. 1, r. 3 & Or. 30, r. 10 *Suit against firm—death of a partner leaving minor heir and business continuing in firm's name—defect, if any.*

Where a firm undertakes a liability, and one of the partners dies leaving a minor as one of his heirs, and the business is carried on under the old style of the firm, it is open to the plaintiff to sue the members of the firm by the name of the firm without suing the minor in his individual capacity. (*King C. J & Zia Ul-Hasan, J.*)

HAFIZ ABDUL RAZZAQUE vs. RAUF AHMED,

1936 O.W.N. 221 = 163 I.C. 893 = A.I.R. 1936 Oudh 245.

Or. 1, R. 8—*Suit regarding village lane—notice required under Or. 1, R. 8.*

Even if a village pathway is regarded as a private pathway, it cannot be contended that one or two or a very limited number of persons have right over it. The community of the village has a right over it, and therefore when a plaintiff sues with regard to a pathway, he can do so only with notice to other persons interested with leave of the Court, under Or. 1, R. 8, C.P. Code. (*Wort J.*)

BISSESSUR PATHAK vs. HARBANS LAL

17 P.L.T. 843

Or. 1, r. 8 *Suit under the section—claim by plaintiff in representative capacity—right based on custom—Denial of such right in specific cases—effect of—suit if barred.*

C. P. Code—(Contd.)

A suit by the plaintiff in a representative capacity for a declaration that they are entitled to certain rights based on a custom is not barred even though it is proved that such right has been denied by defendants in certain specific cases. (*Guha & Lodge JJ.*)

DINONATH KAR vs. CHAUDHURI JITENDRANANDAN DAS MAHAPATRA,

40 C.W.N. 463 = 160 I.C. 121.

Or. 1, r. 9—*Suit for declaration of right of easement in respect of a pathway—necessary parties.*

In a suit for a declaration of a right of easement in respect of a certain pathway, every owner of the servient tenement who denies the plaintiff's right, or is concerned in the obstruction of the pathway is a necessary party. A decree obtained in the absence of any such person is infructuous. 25 C. W. N. 249 followed 19 C. W. N. 1211 & 40 C. L. J. 74 not approved. (*Edgley J.*)

RAKHALDAS MUKHERJI vs. KALIPADA BHATTACHARYA

A I.R. 1936 Cal. 534.

Or. 1, r. 10—*Grandson of mortgagor suing to redeem mortgage—sons of mortgagor refusing to join as plaintiff and added as defendants—plaintiff found not entitled to redeem—decree in favour of the sons of the mortgagor, if can be asked for.*

The grandson of the mortgagor sued for the redemption of the mortgage and in the suit added the sons of the mortgagor, who were also entitled to redeem, as defendants on the allegation that the sons refused to join as plaintiffs as they claimed no interest in the property. The sons did not contest the suit nor applied to be transferred as plaintiffs. The Court having held that the grandson was not entitled to redeem, the latter asked for a decree in favour of the sons. *Held*, that the prayer could not be allowed, as Or. 1, r. 10 C. P. Code referred to bona fide mistakes in the name of the plaintiff and did not apply to cases as here where the plaintiff put forward a case adverse to the sons, and claimed for the grandsons.

C. P. Code—(Contd.)

the sole right to redeem. 31 Cal. 433
relied on. (*Horwill J.*)

**ALAGIRISAMI NAIK vs. SIKANDAR
ROWTHAR.**

71 M.L.J. 614=1936 M.W.N. 1184=
44 M.L.W. 563=A.I.R. 1936 Mad. 960.

**Or. 1, r. 10—Power of Court to add
new parties after final judgment in a mort-
gage suit.**

Under Or. I, r. 10, C. P. Code, the Court has power, even after the final decree in a mortgage suit, to order that a person, whose presence may be necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the suit, to be made a party to the proceedings; accordingly the Court can direct the joinder of another mortgagee who it appears was a necessary party to the suit, but had been left out (*McNair J.*)

**SM. ANNAPURNA ROY vs. RAM RANJAN
MULLICK.**

40 C.W.N. 1173

**Or. 1, r. 10—Transposition of defend-
ant to side of plaintiff if permissible.**

Or. 1, r. 10, C. P. Code is in the widest possible language, and fully justifies the transposition of a defendant to the side of the plaintiff in all cases where it is necessary to do so for a complete adjudication upon the questions involved in the suit, and to avoid multiplicity of proceedings. (*Wor J.*)

**LAL NARAIN SINGH vs. UGESWAR-
DHARI SINGH.**

160. I.C. 149=A.I.R. 1936 Pat. 107.

**Or. 1, r. 10.—Assignment of a bond in
favour of a person void—suit by assignee,
if maintainable**

Where the assignment of a bond in favour of a person is void and the assignee institutes a suit on the basis of the bond, the suit may be considered to have been instituted in the name of a wrong person through a bonafide mistake, and under Or. 1, r. 10, C. P. Code, the name of the assign-

C. P. Code—(Contd.)

or can be substituted in the place of the assignee as plaintiff and the suit proceeded with. (*Srivastava & Nanavutty JJ.*)

**SITLA BAKSH SINGH vs. MAHABIR
PRASAD.**

1936 O.W.N. 414=162 I.C. 229=A.I.R.
1936 Oudh 275.

**Or. 1, r. 10 (2)—Suit for declaration
of status—defendant relying on an agree-
ment between plaintiff and Government,
wherein defendant's status recognised—
Government, if a necessary party.**

The plaintiff sued for a declaration that he and not the defendant, was entitled to be registered as a talukdar under the Gujrat Talukdars Act. The defendant relied on an agreement between the plaintiffs and the Government, which he claimed contained an admission by the plaintiff of the defendant's status. The High Court remanded the suit to allow the plaintiff an opportunity of joining the Government as party to the claim. *Held*, that the Government was a necessary nor a proper party to the question in dispute between the plaintiffs and the defendants, as that question was independent of the validity or invalidity of the agreement entered into between the plaintiffs and the Government, which conferred no contractual right on the defendants and was not entered into by the Government as agents of the defendants. (*Lord Thankerton.*)

**THAKORA SAHIB OF LIMDI vs. KHACHAR
MANNU RUKHAI.**

63 I.A. 248=60 Bom. 634=64 C.L.J. 21
=38 Bom. L.R. 690=1936 O.W.N. 413
=71 M.L.J. 691=162 I.C. 17=A.I.R.
1936 P.C. 150.

**Or. 1, 10 (2) & Or. 30, rr. 3 & 8—
Suit against a firm in firm name—Party
not served with the writ, if can defend on
merits—Application by such party denying
partnership to be added party defendant, if
maintainable.**

In a suit brought against a firm in its firm name, a person who has not been served with a writ of summons as a partner but apprehends that the plaintiff will eventually seek to hold him liable in execution proceedings on the basis of partnership can-

C. P. Code—(Contd.)

not enter appearance and defend the suit on its merits unless he admits that he is a partner. Such a person, however, when being admittedly interested in the defendant firm asserts that he is not a partner, can apply to be added as party defendant under Or. 1, r. 10, C. P. Code even though the plaintiff does not consent to such addition. (*Panckridge J.*)

SREEMUTTY DHAI vs. BHADAR MULL HARGOVIND ROY.

47 C.W.N. 577.

Or. 1, r. 10(5).—*Suit on promissory note one legal representative of deceased debtor impleaded within limitation—others impleaded beyond limitation—suit, if can be decreed against all.*

After the death of a debtor the creditor sued for recovery of money on the basis of a promissory note executed by the deceased debtor, impleading one A as the sole defendant in the suit. Subsequently B & C were added as defendants after the expiry of the period of limitation for recovery of the amount due, and the claim was decreed against A to the extent of the assets, if any, of the deceased debtor in his hands, but the claim against B & C was dismissed on the ground that they were not impleaded within limitation. *Held*, on appeal, that the decree passed by the Court below was correct. If more than one person is in possession of the assets of a deceased debtor every one of them is to the extent to which he is in possession of the assets, a legal representative. The mere fact that one of the legal representatives was impleaded as defendant within limitation cannot warrant the passing of a decree against the others who were not made defendants till the expiry of the period of limitation for the suit. (*Iqbal Ahmed J.*)

MANNI GIR vs. AMAR JOTI CHELA.

1936 A.L.J. 431 = 160 I.C. 1030 = A.I.R. All 94

Or. 2, r. 2.—*Subsequent suit when barred.*

Or. 2, r. 2, C. P. Code does not bar *per se* a subsequent suit brought on a different cause of action. It only purports to bar suits for claims omitted from former suits and arising from the transaction in which

C. P. Code—(Contd.)

the claim was made in the former suit and splitting up of the reliefs in respect of the same cause of action. It does not require that where several causes of action arise from one transaction the plaintiff should sue for all of them in one suit. The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. (*Mosely & Ba U JJ.*)

U PO KE vs. U. P. THLIN.

161 I.C. 820 = A.I.R. 1936 Rang. 167.

Or. 2, r. 2.—*Claim not known to plaintiff at time of suit—non inclusion of such claim, if bars suit.*

To constitute an omission to sue by the plaintiff within the meaning of Or. 2, r. 2, C. P. Code, it is necessary that the claim must have been known to him. It is only a claim or remedy known at the time of the institution of the suit of which a subsequent litigation will be barred. Where therefore a plaintiff was unaware of a claim at the time of his suit, the non-inclusion of that claim will not preclude him from subsequently suing in respect of that claim, even though he could, by proper inquiry, make himself aware of the claim. (*Venkataramana Rao J.*)

VENKATACHANDIKAMBA vs. VISWANADHAMAYYA.

71 M.L.J. 264 = 1936 M.W.N. 671 = 44 M.L.W. 379 = A.I.R. 1936 Mad. 699.

Or. 2, r. 2.—*Instalment bond with default clause—suit for recovery of instalment although whole amount had become recoverable—plaint expressly waiving benefit of default clause—subsequent suit for recovery of further instalments, if maintainable.*

An instalment bond provided that the amount would be paid by half yearly instalments and in case of default of any two instalments the whole amount would become payable and the creditor would be at liberty to sue for the whole amount. Defaults were made for five instalments, and a suit for recovery of these instalments was filed. In the plaint the creditors expressly mentioned that they were abandoning their

C. P. Code—(Contd.)

right to recover the whole amount in a lump sum, and that in future they would sue for the future instalments as they fall due. This suit was decreed. Later on they brought another suit for recovery of one further instalment when it fell due. *Held*, that the suit was not barred by reason of Or. 11, r. 2, C. P. Code. (*Sulaiman C. J. & Bennet J.*)

RAM SARUP vs. PEARE LAL.

57 All 838.

Or. 2, r. 2—Suit by wife for maintenance—no prayer that maintenance be charged on the property of her husband—subsequent suit for getting maintenance fixed in former suit, charge on the property of her husband—such suit is barred.

The claim of a wife for maintenance is not a charge upon the estate of her husband whether joint or separate until it is fixed and charged upon the estate. Where the wife brings a suit for maintenance against her husband, it is open to her, to pray for a relief for getting the maintenance allowance charged on the property of her husband, but if she does not ask for any such relief, she cannot subsequently bring a suit for getting the maintenance fixed in the former suit, charged on the property of her husband on the ground that the husband was intending to transfer the property with a view to interfere with her maintenance allowance. The subsequent suit would be barred by Or. 2, r. 2 C. P. Code. (*Harries & Ganganath JJ.*)

JOGWALA PROSAD vs. MST, PADMABATI.

1936 A.W.R. 1006.

Or. 2, r. 3—Plaintiff joining two independent claims in one suit—Procedure to be adopted by the Court.

The plaintiff in one suit sought for a declaration of his title as proprietor in respect of a portion in certain land and for partition of his share therein and in the same suit he also sued the admitted rights of the land calling upon them to remove a building from his holding. *Held*, that the suit could not be tried in the form in which

C. P. Code—(Contd.)

it was instituted because it joined two claims and causes of action which were absolutely independent and unconcerned with each other. In such circumstances it could ask the plaintiff to elect to proceed with one of the claims. (*Mohammad Noor & Varma JJ.*)

NETAI LAL DATTA vs. GOBINDA BHUSAN & ORS.

A.I.R. 1936 Pat. 142=161 I.C. 695.

Or. 3, rr. 3 & 4—Application for execution signed and verified by decree-holder filed without acceptance endorsed by pleader—Acceptance endorsed with leave of Court on still later date—Application, if duly filed on first date.

Where an application for execution duly signed and verified by the decree-holders was filed but the pleader acting for them did not file any Vakalatnama on that date, and on a subsequent date a Vakalatnama was filed which did not bear any endorsement of acceptance by the pleader and on a yet later date acceptance was endorsed with the permission of the Court, *held*, that the application was duly filed on the first date. (*M. C. Ghosh J.*)

JAGADISH CHANDRA DHABALDEY vs. SATYA KINKAR SAHANA.

40 C.W.N. 730=63 Cal. 733.

Or. 3, r. 4—Appeal filed in Court not by the Advocate authorised by client, but by another Advocate on behalf of the authorised Advocate—validity of the presentation.

The appellant engaged a certain Advocate for filing his appeal and duly executed a power of attorney in his favour. The memorandum of appeal presented to the Court was however not signed by the Advocate empowered by the Appellant, but by another Advocate on behalf of the Advocate empowered. *Held*, that there was no proper presentation of the appeal and it was liable to be dismissed. (*Agha Haider J.*)

K. L. GAUBA vs. INDO SWISS TRADING CO.

17 Lah. 610=38 P.L.R. 258=163 I.C. 141=A.I.R. 1936 Lah. 500.

C. P. Code—(Contd.)

Or. 3, r. 4 (1)—*Vakil intended by party to act on his behalf—Formal defect in Vakalatnama—Effect of.*

Where a vakil is actually intended by a party to act on his behalf and does so act a merely formal defect, (for example, the fact of another vakil's name remaining in the vakalatnama) is of no importance. (*Sullaiman, C. J., & Bennet J.*)

RAM SWARUP vs BHAGABUTTY PROSAD.
1936 A.W.R. 516 = 1936 A.L.J. 586 =
164 I.C. 725 = A.I.R. 1936 All. 636.

Or. 3, r. 4(2)—*Pleader re-presenting party in lower court, if competent to file and prosecute appeal.*

Or. 3, r. 4 (2), C. P. Code provides that every appointment of a pleader shall be filed in Court and shall be deemed to be in force so far as a client is concerned. Therefore a pleader who validly represented a party in the trial court is fully competent to present a memorandum of appeal on behalf of his client from the judgment and decree passed by the trial Court and to prosecute the appeal in the appellate Court. (*Agha Haidar J.*)

RASUL SHAH vs. DEWAN CHAND.
A.I.R. 1936 Lah. 583 = 165 I.C. 274.

Or. 4—*Plaint being insufficiently stamped not admitted on the day on which it is presented—date on which the suit must be deemed to have been instituted.*

When a suit was not admitted on the day on which the plaint was presented on the ground of insufficiency of the court-fee paid, but was admitted on a subsequent date on payment of the balance of the fee, the suit, must for purposes of Or. 4 of the C. P. Code, be deemed to have been instituted on the date on which the plaint was presented and not on the subsequent date on which it was admitted. (*Panckridge J.*)

HIRENDRANATH DATTA vs, DHIREN DRA NATH NIVOGI.

62 Cal. 1115.

Or 5, rr. 14 & 15 & Or. 29 r. 1—*Verification of plaint of Company by Sec-*

C. P. Code—(Contd.)

retary—affidavit as to competence to verify if necessary.

Where in a suit by a Company registered under the Companies Act, the plaint was signed and verified by the Secretary, and the plaint stated that he was authorised by the articles of association of the Company to do all acts in connection with suits, and it appeared that the articles of association empowered the Secretary to verify pleadings held, that the requirements of Or. 29, r. 1, C. P. Code, were satisfied, and no affidavit testifying to the fitness of the Secretary to verify was required. (*Khundkar J.*)

GOPALGANJ LAKSHMI VANDAR vs, PURNA CHANDRA DUTTA BANIK,
40 C.W.N. 930.

Or. 6, Or. 17—*Leave to amend pleadings, when should be allowed.*

Leave to amend pleadings should be refused where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time, and this general rule ought not to be departed from except in very exceptional cases, e. g., where a plaintiff suing on a pronote would be losing his money because of a technical error in the execution of the pronote. 10 Rang. 74 distinguished. (*Dunkley J.*)

KRISHNA PROSAD SINGH vs. MA AYE.
14 Rang. 383 = 165 I.C. 810 = A.I.R. 1936 Rang. 508.

Or. 6, r. 17—*Appellant praying in appeal for amendment of plaint on the ground of mistake in typing—No explanation offered why the mistake was not discovered earlier—Amendment, if may be allowed.*

Where in the appellate stage, the appellant prayed for permission to amend his plaint in the original suit on the ground of a mistake having been made in the typing of the draft plaint, but he offered no sufficient explanation as to why the alleged mistake was not discovered by him till after the disposal of the case by the lower court, held, that it was not a proper case in which the High Court should exercise its discre-

C. P. Code—(Contd.)

tion in allowing the amendment prayed for. (*Klwanja Mohammad Noor & Varma J.J.*)

APURBA KRISHNA MITRA vs. RAM BAHADUR.

161 I.C. 862 = A.I.R. 1936 Pat. 191.

Or. 6, r. 17—Suit on pronote—prayer to amend plaint allowing plaintiff to base suit on pronote acknowledging barred debt—amendment, if can be granted.

In a suit on a pronote, the plaintiff applied for leave to amend his plaint by basing his claim on the first of several pronotes filed along with the plaint and by treating the subsequent notes as acknowledgment of the original debt. Subsequently it being found that one of these notes was time barred, the plaintiff applied for leave to treat the time barred note as one containing a promise to pay a time barred debt and for basing his cause of action on that note. *Held*, that the Court had power to grant the prayer made by the plaintiff for amending the plaint. (*Venkatasubba Rao J.*)

CHELLAM SAKK, RAJA vs. MATHUSAMI MOOPAR.

71 M.L.J. 666 = 44 M.L.W. 267 = 1936 M.W.N. 486 = 165 I.C. 503 = A.I.R. 1936 Mad. 632.

Or. 6, r. 17—Suit on pronote—Pronote barred but original debt subsisting—amendment if can be allowed to include claim on original debt.

Where all the facts of the original loan and all its terms are set out in the plain, but the plaint is based on a pronote insufficiently stamped or barred by limitation, the plaintiff is entitled to succeed alternatively on the original loan although there is no such prayer in the plaint. Where therefore a pronote was executed by the defendant, in settlement of accounts relating to a transaction, and the plaintiff sued on the pronote but it was found to be barred, and the plaintiff thereupon fell back upon the original debt which was found to be not barred by reason of certain payments made by the defendant, *held*, that under the circumstances, the plaintiff could be allowed to amend his plaint so as to include a prayer

C. P. Code—(Contd.)

for a decree on the original cause of action irrespective of the promissory note. (*Beasely C. J., King & Gentle J.J.*)

OFFICIAL ASSIGNEE OF MADRAS vs. V. A. KUPPUSWAMI NAIDU.

A.I.R. 1936 Mad. 785 = 71 M.L.J. 250 = 44 M.L.J. 258 = 1936 M.W.N. 912 = 165 I.C. 301.

Or. 6, r. 17—Amendment of plaint so as to bring suit into proper form if should be allowed in appellate Court when objection taken in trial Court and limitation for bringing suit expired.

Where a suit challenging a patni sale was brought in a wrong form, and objection to the form of the suit was taken in the written statement but the plaint was not amended in the trial court, and amendment of the plaint so as to bring the suit into a proper form was sought to be made in the appellate court after the expiry of a year from the date of the sale, *held*, that the application was liable to be rejected, even where the purchaser at the patni sale was a party to the suit. (*Jack & Edgley J.*)

MAHAMMED BADSHA MIA vs. KUMAR ARUN CH. SINHA.

40 C.W.N. 1233.

Or. 6, r. 17—Amendment of application allowed subject to payment of costs—Non-applicant appealing against order before date and accepting costs on the date—Appeal if valid.

Where an application for permission to amend an application under Sec. 53, Provincial Insolvency Act was allowed on condition that the applicant would pay costs by a particular date, but before that date the non-applicant preferred an appeal against the order allowing amendment and at the same time accepted the costs when tendered on the due date, *held*, that this did not affect the non-applicant's right of appeal. (*Grille J. C.*)

SADASHIV RAO vs. BALMUKUND.

A.I.R. 1936 Nag. 20.

Or. 7, r. 7—Omission to indicate basis of relief, if a fatal defect.

C. P. Code—(Contd.).

Although it is desirable that the basis on which the plaintiff seeks relief should be indicated in the plaint, yet a suit cannot fail for its omission, where all the facts have been stated, and specially, when no prejudice has been caused to the defendant. (*Khanja Mohammed Noor J.*)

MOTI MAHTON vs. DEBAL MAHTON.

17 P.L.T. 67, = 159 I.C. 966.

Or. 7, r. 11—Omission to state ground on which right of pre-emption based—plaint, if rendered defective.

In a suit for pre-emption the plaintiff stated in the plaint in general terms that he had a right of pre-emption and did not specify the grounds on which he based his claim. In the reply however, the plaintiff clearly stated that his claim to pre-empt the property was by reason of his being a co-sharer in the property sold and of his being the owner of contiguous property. Held, that under the circumstances, it could not be said that the plaint did not disclose a cause of action. All that could be said was that the plaint was not sufficiently specific. The replication however put the matter right as the pleading taken as whole made the plaintiff's position quite clear. (*Tekchand & Currie, J.*)

SATNARAIN & ORS. vs. PHEROZE BEHRAMJI & ORS.

38 P.L.R. 755.

Or. 7, r. 11 (c) & Sec. 148—Time granted for payment of deficit Court-fees, if may be extended from time to time and after expiry of period originally fixed.

Since under Or. 7, r. 11 (c), read with Sec. 148, C. P. Code, the Court can enlarge successively the time granted, even after the expiry of the period originally fixed. Therefore, even when an application to continue an ordinary suit in *forma pauperis* is made after the expiry of the time fixed for the payment of deficit Court-fees, but at a time when an application for extension of the period is pending, the Court has power to entertain such application. (*Mukherji & S. K. Ghosh JJ.*)

HAFIZ MOHAMMED FATEH NASIB vs. SARAI INDU MUKHERJI.

40 C.W.N. 747 = 162 I.C. 639 = A.I.R. 1936 Cal. 221.

C. P. Code—(Contd.).

Or. 7, rr. 14 & 18 (1)—Document not produced under R. 14, (2), if can be used latter to contradict defendant in cross-examination.

It is open to a plaintiff to tender in evidence the previous statement in writing by the defendant in cross-examination of the latter to contradict him under Sec. 145, Evidence Act, even though the document had not been produced under Or. 7, r. 14 (2), C. P. Code. The penalty to the non-production of a document under Or. 7, r. 14 is contained in sub-rule (1) to R. 18. Sub rule (2) is an exception to sub rule (1), (*Bennet J.*)

LAKHPAT PATHAK vs. GHIRAN PATHAK

1936 A.W.R. 953 = 1936 A.L.J. 1195.

Or. 8 r. 2—Objection as to maintainability of suit, when should be taken.

Under Or. 8, r. 2, C. P. Code, the defendant must raise by his pleading all matters which show that the suit is not maintainable, or that the transaction impeached are either void or voidable in point of law. An objection that the suit as framed was not maintainable, if not raised in the trial court, must be deemed to have been waived, and in such circumstances, it is not open to the defendant to raise the objection for the first time in the appellate Court. (*Barlee & Sen JJ.*)

WAMAN RAMKRISHNA GHOTGE vs. GANPAT MAHADEO NEVAGI.

60 Bom. 34 = A.J.R. 1936 Bom. 10.

Or. 8, r. 6—Taxed costs deposited in Court pending decision in a claim to set off, if can be claimed by attorney in exercise of his lien for costs.

In an application for execution of an order for costs, the defendant in compliance with the orders of the Court, deposited in Court the taxed costs pending a decision as to his claim to set off costs ordered against the plaintiff in another suit. The plaintiff's attorney thereupon applied for leave to withdraw the amount in exercise of his lien for costs against the plaintiff. Held, that

C.P. Code—(Contd.)

he was entitled to exercise his lien irrespective of any claim to set off which the defendant might have against the plaintiff, (*Panckridge J.*)

HARI DAS DATTA vs. KALU RAM BHOSHINGHA.

63 Cal. 746=40 C.W.N. 458.

Or. 8, r. 6—*Provisions of the rule, if sole provision for set-off of ascertained amount—Equitable set-off, if may be claimed in respect of ascertained sum.*

An equitable set off can be claimed not only in respect of an unascertained amount, but also in respect of an ascertained amount. But in order that a claim for equitable set off may arise, it is not sufficient that there are cross demands; it is further necessary that there should be a connection between them which makes it inequitable to drive the defendant to a separate suit—as when the demands arise out of the same transaction or when there is on each side knowledge of and confidence in one debt discharging the other. (*R. C. Mitter, J.*)

HARI ANANDA SAHA PODDAR vs. MOHAMMAD ISHAHAK MIA.

40 C.W.N. 751.

Or. 8, r. 6, & Or. 20, r. 19 (3)—*Defensive set off and counter-claim—Distinction between the two.*

A set off may be defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim, or it may be a counter claim under which the defendant claims a decree for the surplus amount due to him. In a defensive set off, the set off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim, the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, i. e., at the date when he files the written statement. The words "legally recoverable" in Or. 8, r. 6, mean legally recoverable at the date of the institution of the suit in one case and mean legally recoverable at the date when the counter claim is made in the other case. Although Or. 8, r. 6 & Or. 20, r. 19, C. P. Code, make no distinction between a mere

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set off i.e., a defensive set off and a counter-claim, a distinction has been made by Indian Courts between the two in accordance with the law of England which is based on a sound principle. (*Nasim Ali & Henderson JJ.*)

JITENDRANATH ROY vs. JNANADA KANTA DAS GUPTA.

A.I.R. 1936 Cal. 277.

Or. 9, r. 3—*Provisions of the rule if obligatory.*

Or. 9, r. 3, C. P. Code, is not obligatory but merely gives the Court discretion to make an order in suitable circumstances that the suit be dismissed. (*Fazl Ali J.*)

RAM CHANDRA FARAYA LAL vs. BHAIA DHARMAN SAHU.

163 I.C. 557=A.I.R. 1936 Pat. 437.

Or. 9, r. 4—*Petition of restoration being dismissed, plaintiff, if can institute fresh suit.*

The alternative provisions Or. 9, r. 4, C. P. Code are not mutually exclusive, and a plaintiff whose application for restoration of his suit has been dismissed, is not precluded from instituting a fresh suit. (*James & Rowland JJ.*)

MST. BALKESIA vs. BHAGWAN GIR.

15 Pat. 716=17 P.L.T. 644.

Or. 9, r. 5—*Defendant absconding—Plaintiff if can be asked for filing fresh address and process fee.*

Where the report on the summons is that the defendant is absconding, it is not proper for the Court to stay the suit under Or. 9, r. 5, C. P. Code, and to ask the plaintiff to file within a fixed period a new address and fresh process fee. (*Jailal, J.*)

SULTAN SINGH vs. RAMSARUP.

38 P.L.R. 197.

Or. 9, r. 8—*Hearing of a suit—meaning of.*

By the expression "hearing of the suit" in Or. 9, r. 8, C.P. Code, is meant "the hearing

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at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it;" but in cases where it was clearly never intended that there should be a hearing of the suit in the ordinary sense of the word, but merely some interlocutory matter decided between the parties as to the future conduct of the suit, the provisions of Or. 9, r. 8, C. P. Code, have no application. (*Agha Haidar J.*)

MANOHAR DAS vs. BARADRI SHIKAR-PURIAN.

35 P.L.R. 58=161 I.C. 790=A.I.R. 1936 Lah. 280.

Or. 9, r. 8—Suit, if can be wholly dismissed for default when part of claim admitted.

Where a part of the claim in a suit has been admitted by the defendant, the suit cannot be dismissed in toto for default under Or. 9, r. 8, C. P. Code. It can be dismissed only to the extent to which the defendant denies the claim of the plaintiff, and with regard to that part of the plaintiff's claim which has been admitted by the defendant, the suit should be decreed *pro tanto*. (*Jaisil J.*)

BIR BAL vs. JIWAN SINGH.

35 P.L.R. 484.

Or. 9, r. 8—Plaintiff absent on due date—Reason of absence stated to be missing of last available train—suit if should be restored.

In an application for restoration of a case dismissed for default on account of plaintiff's absence on the due date of hearing, the affidavit showed that the man had to drive some miles to the station to catch the train, and he missed it for a few minutes. *Held*, it could not be said that he had intentionally absented himself from attending the Court and the Court could have satisfactorily adjusted the matter by ordering payment of costs. (*Baguley & Mosely JJ.*)

K. S. R. M. CHETTIAR FIRM vs. PREM SINGH BINDRA & ORS.

A.I.R. 1936 Rang. 204=162 I.C. 842.

Or. 9, r. 8 & 9—Date fixed for payment of cost by defendant—plaintiff failing to appear on that date—suit if may be dismissed.

During the hearing of a suit an order was passed fixing a certain date as the date on which the defendant was to pay a stated sum to the plaintiff as cost of adjournment. Apparently, according to the order on the record, no other proceeding was to take place on that date except possibly the fixing of a date for recording the evidence. On that date neither the plaintiff nor his counsel appeared in Court and the suit was dismissed for default. *Held*, that the suit could not be dismissed for default under Or. 9, r. 8, C. P. Code for the plaintiff's failure to appear on such date. (*Jai Lal J.*)

BIR BAL vs. JIWAN SINGH.

35 P.L.R. 484.

Or. 9, r. 9—Order refusing to set aside dismissal in default, if appealable.

An application was made to the District Judge for grant of probate of a will. On the date of the hearing of the application, one of the applicants being absent, the District Judge dismissed the application in default. An application to set aside the dismissal having been dismissed, the applicants appealed to the High Court. An objection was taken on behalf of the respondents that no appeal lay and that the only remedy of the applicant in such cases was to make a fresh application for grant of probate. *Held*, that Or. 9, r. 9 of the C. P. Code applies to probate proceedings and an appeal lies from an order refusing to set aside an order dismissing the application for grant of probate for default. (*Jaisil J.*)

MONOHAR LAL vs. RUPLAL.

35 P.L.R. 263=A.I.R. 1936 Lah. 712=164 I.C. 334.

Or. 9, r. 9 add Or. 43, r. 1 (c)—Probate proceedings—dismissed for default—application for revival under Or. 9, r. 9—decision if appealable.

An application for grant of probate if dismissed for default, can be revived by an application under Or. 9, r. 9. The decision on such an application is appeal-

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able under Or. 43, r. 1 (c). (*Addison & Abdul Raschid JJ.*)

RUP LAL vs. MONOHAR LAL.

A.I.R. 1936 Lah. 863 = 38 P.L.R. 973.

Or. 9, r. 9 & Or. 43, r. 1(c)—Suit dismissed for default—Application for restoration dismissed by Munsiff for non-prosecution—Appeal if lies.

On the plaintiff's suit having been dismissed for default of appearance he made an application for restoration which was dismissed by the Munsiff for non-prosecution. On appeal the District Judge overruled the preliminary objection that no appeal lay to him and set aside the order of the Munsiff and restored the application for restoration of the suit to the original number to be disposed of by the Munsiff according to law. *Held*, in revision, that the order passed by the Munsiff was under Or. 9, r. 9, C.P. Code and was appealable to Dist. Judge under Or. 43, r. 1(c) of the C. P. Code. (*Harris & Bajpai JJ.*)

UMA DATT UPADHYA vs. ZAKIA BIBI.

1936 A.L.J. 305 = 1936 A.W.R. 454 = A.I.R. 1936 All. 737 = 161 I.C. 840.

Or. 9, r. 13—Application to set aside ex parte decree filed after the date of limitation—Application alleging want of knowledge of the decree—Burden of proving want of knowledge, if lies on him.

A person applying for setting aside an ex parte decree under Or. 9, r. 13, C. P. Code more than 30 days from the date of the decree, must, where he pleads want of knowledge of the decree, prove that fact. 7 Lah. 161 relied on (*Baguley J.*)

JAGADAMMA PANDIT vs. NARESH PANDEY.

A.I.R. 1936 Rang. 305 = 164 I.C. 286.

Or. 9, r. 13—Application for setting aside ex parte decree—Court if can overrule plea of limitation on principles of justice, equity and good conscience.

In an application for setting aside an ex parte decree under Or. 9, r. 13 C. P. Code on the ground that the applicant had not been properly served with summons,

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the opposite party contended that the application was barred by limitation. The Court, however, set aside the ex parte decree without considering the question of limitation on the ground that the interests of justice required that the applicant should be given a chance to contest the suit. *Held*, that the Court had no power to overrule the plea of limitation raised by the opposite party and that the order setting aside the sale could not be sustained. (*Baguley J.*)

JAGADAMMA PANDIT vs. NARESH PANDEY.

A.I.R. 1936 Rang. 305 = 164 I.C. 286

Or. 9, r. 13 & Sec. 148—Case dismissed for default—Order restoring case on payment of costs to opposite party—Payment not made in time—Court, if can extend time for payment.

An order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order but on the contrary is an order contemplated by Or. 9, r. 13, C. P. Code. The effect of such an order is that as soon as the time fixed in the order expires and no payment is made to the opposite party, the application stands dismissed and the Court no longer remains seized of the application. In such a case the Court cannot grant any extension of time for payment under Sec. 148 C. P. C. 36 All. 78; 48 All. 199; 53 M. L. J. 494 & 37 C. W. N. 878 relied on. (*Allsop & Ganganath J.*)

GAYA DIN vs. LALTA PERSHAD.

1936 A.W.R. 414 = 163 I.C. 554 = 1936 A.L.J. 566 = A.I.R. 1936 All. 477.

Or. 9, r. 14—Ex parte decree in mortgage suit—subsequent purchaser of a part of mortgaged property party to suit, but not mentioned in application to set aside ex parte decree—Effect of.

An order setting aside an ex parte decree in a mortgage suit cannot be held to be bad, simply because a subsequent purchaser of a part of the mortgaged property who was a party to the suit and a party to the decree is not given any notice of the application to set that decree aside and is not even men-

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tioned in the application as one of the persons concerned. (*Allsop & Gangamath J.*)

NANDAN SINGH vs. SUNDAR KUAR.

1936 A.L.J. 544=1936 A.W.R. 522=
A.I.R. 1936 All. 410

Or. 13, r. 4—Book of account marked and signed by trial judge—name of person producing the book not included in the endorsement—document if rendered inadmissible in evidence.

In an action brought on a *hahi khata* account, the trial judge marked the book of account with the number of the suit, the date and his signature. But neither the name of the person producing the book, nor a statement that it had been admitted in evidence had been included in the endorsement made by the trial judge. Held, that the omission, thought it constituted a non-compliance with the provisions of Or 13, r. 4, C. P. Code, did not render the document inadmissible in evidence. (*Wort & Rowland JJ.*)

MUKHI RAM vs. FIRM KAMTA PRASAD BALAM DAS.

161 I.C. 164.

Or. 13, r. 7—Procedure to be adopted in respect of the admission of a disputed document.

Under Or. 13, r. 7, C. P. Code, a document must be either placed on the record or returned to the person producing it. As soon as formal or *prima facie* evidence of its genuineness has been given, it should be endorsed as "admitted in evidence" and placed on the record. Subsequently if the judge finds the document to be a forgery, or its genuineness not satisfactorily proved, further endorsement "genuineness not established" or words to that effect might be added, but it should not be endorsed as "rejected", which implies that the document should not form part of the record and should be returned to the person producing it. The question of the correct procedure is, however, a matter of technical rather than of practical importance and cannot affect the validity of the trial, if the party objecting to the admission of the

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document is not prejudiced. (*King C.J. & Zia-ul-Hassan J.*)

KEOLAPATI vs. HARNAM SINGH.

A.I.R. 1936 Oudh 298=1936 O.W.N.
619=162 I.C. 527.

Or. 14, r. 1—Settlement of issues—duty of Court.

In framing an issue regarding limitation, the Court should first ascertain what article of Limitation Act the parties consider to be applicable to the suit as framed. If the application of a particular Article raises a question of fact, an issue should be struck on those facts; and if the facts are not in dispute, it may be possible to decide the question on purely legal arguments in the initial stages of the case without putting the parties to the expense of a trial. (*Becket J.*)

HUSSAIN BAKSH vs. SECRETARY OF STATE & ANR.

17 Lah. 39=38 P.L.R. 883=A.I.R.
1936 Lah. 982.

Or. 14, r. 2—Prayer to try preliminary issue of law first—Factors that should be taken by the Court into consideration.

In deciding the question as to whether the Court should grant or refuse a prayer made by a party to try a preliminary issue on a point of law, some harmony has to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of Or. 14, r. 2, C. P. Code, which is for the purpose of preventing the injustice of a party being able to force the opponent to go at length into the evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. (*Courtney Terrel, C. J.*)

JANKI DAS vs. KALOO RAM.

17 P.L.T. 253=A.I.R. 1936 Pat. 250=
162 I.C. 486.

Or. 14, r. 2—Preliminary issue on a point of law—duty of the court in deciding such issue—interference by High Court under Sec. 115, C. P. Code.

Or. 14, r. 2 of C. P. Code is mandatory. The Court has to form and express its

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opinion as to whether the case can be disposed of by the decision of the proposed issue of law but its opinion must be based on reasonable materials. Interlocutory orders are certainly matters of the Court's discretion, but the Court should exercise that discretion according to the proper principle of justice with regard to the proper interpretation of the rule in question. The High Court has power under Sec. 11, C. P. Code to interfere with the lower Court's order when the discretion has not been properly exercised. 153 I.C. 546 not followed 16 P. L. T. 311 referred to. (*Courtney Terrel C J.*)

JANKI DAS vs. KALOORAM.

17 P.L.T. 253 = A.I.R. 1936 Pat. 250 = 162 I.C. 486.

Or. 14, r. 2—*Court summarily rejecting prayer for trying preliminary issue on point of law—High Court, if will interfere in revision.*

Where a Court summarily rejected a prayer to try a preliminary issue on a point of law, the refusal of the High Court to exercise its revisional jurisdiction might give rise to the gravest hardship. The injured party has no right of appeal and refusal to exercise jurisdiction would mean that the lower Court's unfettered decisions might put the injured party to an enormous expense in going into issues which were unnecessary on the mere contention that the ultimate decision would be open to appeal. 14 Pat. 489 & 153 I.C. 546 not followed. (*Courtney Terrel, C. J.*)

JANKI DAS vs. KALOO RAM.

17 P.L.T. 253 = A.I.R. 1936 Pat. 250 = 162 I.C. 486.

Or 17, r. 2—*Failure to appear, when takes place.*

The mere filing of a list of witnesses before the case has been called on for hearing does not amount to an appearance within the meaning of the Explanation to Or. 17, r. 2, C. P. Code. What the explanation implies is, that at the time when the case is called on for hearing, if either party is present or is represented in Court by an agent or pleader, then he has not failed to appear, but if at that time neither he is present nor he is represented in Court by

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an agent or pleader, he has failed to appear and he is entitled as of right to show cause for his non-appearance under Or. 9, r. 13, C. P. Code. (*Sulaiman C. J. & Collister J.*)

BHUVAN SINGH vs. PREM NARAIN.

1936 A.W.R. 835 = A.I.R. 1936 All. 619 = 164 I.C. 541 = 1936 A.L.J. 127.

Or. 17, r. 2—*Explanation—Application of the rule—Remedy of the aggrieved party.*

Where the explanation to Or. 17, r. 2 applies, the Court which dismisses a suit or passed a decree ex parte must be deemed to have been deciding the matter upon its merits and not acting merely under the provisions of Or. 9, r. 8. The remedy of the aggrieved party in such a case is to file an appeal against the decree and not to make an application under Or. 9, r. 9 C. P. Code. This is so even if the Court did not intend to decide the case on merits and did intend to dismiss it for default. (*Allsop J.*)

MST. JAFRI BEGUM vs. ASGHAR ALI KHAN

1936 A.W.R. 499—1936 A.L.J. 635.

Or. 17, r. 3—*Date fixed for final disposal changed at instance of plaintiff—on date subsequently fixed, plaintiff applying for adjournment—adjournment refused and case decided on merits—application for restoration, if lies.*

The date fixed for final disposal of a suit was changed on the application of the plaintiff. On the date subsequently fixed, the plaintiff's counsel moved an application for further adjournment and stated that he had no instructions except to move for an adjournment. The Court passed an order that the case must proceed under Or. 17, r. 3, C. P. Code. Plaintiff's counsel however did not take any further steps in the case. The Court after examining two witnesses for the opposite party passed a decree disposing of the suit on the merits. The plaintiff applied for restoration of the suit. *Held*, that the case came under Or. 17, r. 3, C. P. Code, and that being so, no application lay for restoration. (*Sulaiman C. J. & Bennet J.*)

LACHHMI NARAIN vs. SANKER LAL.

1936 A.W.R. 791 = 1936 A.L.J. 902 = 164 I.C. 927 = A.I.R. 1936 All. 670.

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Or. 20, r. 2—*Judgment written by ex-judge if valid—procedure to be followed by his successor in interest.*

Even after a judge has ceased to have any jurisdiction in a Court because he has retired or has proceeded on leave or has been transferred from the Court in which the trial was held, he is entitled, having heard the evidence, to write and sign a judgment and his successor in office may pronounce the said judgment. But his successor has clearly a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor, he ought either to act in accordance with the provisions of Or. 18, r. 15, C. P. Code, or to hear the case *denovo*. (*Page C. J. Mya Bu & Baguley JJ.*)

HARGULAL vs. ABDUL GANY HAJEE I-HAQ.

14 Rang, 136 = A.J.R. 1936 Rang. 147
161, I.C. 967.

Or. 20, r. 4 & Or. 41, r. 11—*Court dismissing appeal under Or. 41, r. 11, if must write a proper judgment.*

An appellate Court in dismissing an appeal under Or. 41, r. 11, C. P. Code, must write a proper judgment in accordance with the requirements of the law. If it fails to do so, it acts with material irregularity in the exercise of its jurisdiction, and its order dismissing the appeal is liable to be set aside by the High Court in revision. (*Bhude J.*)

MOHAMMAD ARIF vs. MOHAMMED ISHAQ.
38 P.L.P. 431.

Or. 20, r. 11 & Or. 21, rr. 11 & 40
Application for execution of decree by arrest—Judgment-debtor not applying for instalments but Court ordering payment of decree by instalments—High Court on revision directing payment of certain sum monthly as condition of exemption from arrest—Subsequent application by decree-holder for arrest—Lower Court, if bound by High Court's order in the previous case.

An application was made by a decree-holder under Or. 21, r. 11, C. P. Code, for leave to execute his decree by the arrest

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and imprisonment of the judgment-debtor. The judgment-debtor did not apply for instalments under Or. 20, r. 11 C. P. Code, but merely relied on an affidavit praying for instalments. The Court ordered the payment of the decree by instalments, but the High Court in revision modified the order directing the judgment-debtor to pay certain sum monthly as a condition for exemption from arrest and imprisonment. The decree-holder subsequently filed another application for execution under Or. 21, r. 11. It was contended that the lower court was bound to abide by the order passed by the High Court in the previous execution case. *Held*, that the discretion of the lower court was not fettered by the order of the High Court and it should pass any order which it deemed fit. (*Page, C. J. & Ba U, J.*)

MOHAMMAD SIDDIQ AHMED vs. KARAM ALI KHAN.

A.I.R. 1936 Rang. 280.

Or. 20, r. 13—*Administration suit—Final decree—form and contents.*

The Code nowhere lays down what are to be the contents of a final decree in an administration suit. It depends upon the nature of dispute in each case. Where the order in a suit has the effect of finally determining all the matters in controversy between the two disputing parties, it must be construed as a final decree to that extent. (*Jai Lal & Dalip Singh JJ.*) •

MT. SHAHJADI BI vs. MT. RAHMAT BI.
A.I.R. 1936 Lah. 879.

Or. 20, r. 19 & Or. 8, r. 6—*Unliquidated damage for breach of contract whether can be set off against plaintiff's claim.*

A set off is not limited to Or. 8, r. 6, C. P. Code. Under Or. 20, r. 19 it need not be for an ascertained sum. Where under a lease of certain property, the lessor had the duty to repair a certain "bund" but on his failing to do so, the lessee incurred expenditure in repairing the same, the lessee can in a suit for arrears of rent by the lessor, claim a set off on account of the

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expenses connected with the repairs of the embankment. (*Bennet & Smith, JJ.*)

KAMAL DEBI vs. DR. SHRI KHUDADAD,
1936 A.L.J. 625 = 1936 A.W.R. 533.
163 I.C. 872 = A.I.R. 1936 All. 522.

Or. 21, r. 2—Adjustment of claim to restitution, if must be certified.

Or. 21, r. 2(3), C. P. Code, only prevents uncertified adjustments of moneys payable under a decree or the adjustment of a decree from being recognised. An adjustment of a claim to restitution is not the same as the adjustment of a decree. Where therefore the amount payable under a decree having been reduced by the appellate Court, the judgment-debtor applied for refund of the excess collected from him by the plaintiff by way of restitution, but the adjustment of the claim to restitution had not been certified, *held*, that the adjustment did not come within the provisions of Or. 21, r. 2, C. P. Code. (*Pandurang Row J.*)

SUNDARARAJAN CHETTIAR vs. SETHU-RAMASAMI CHETTY.

71 M.L.J. 344. = 1936 M.W.N. 758 = 44 M.L.W. 287 = A.I.R. 1936 Mad. 840.

Or. 21, r. 2—Adjustment not certified, whether can be pleaded in execution of decree by assignee.

If an adjustment of a decree is not certified within the period prescribed, the judgment-debtors cannot raise it as an objection to the execution of the decree by the assignee of the decree. 55 Mad. 722 followed. (*Mosely & Mackney, JJ.*)

K. M. ESQOF vs. HAMIDAN BIBI.

A.I.R. 1936 Rang. 218.

Or. 21, r. 2—Uncertified payment by one judgment-debtor—Plea of payment in execution by another judgment-debtor—Executing court, if can take notice of such payment.

Where one of the several judgment-debtors pays up a decree but such payment is not certified under Or. 21, r. 2 of the C. P. Code, the executing court cannot

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take notice of such payment even though the plea is taken by not the judgment-debtor who has paid but by others who have not. The words of cl. (3) of the rule are too plain to admit of any other construction than that the court executing the decree is barred in *limini* from considering any allegation that a payment not certified has been made. It is inconceivable that the legislature should have intended when there are several judgment-debtors in a case to place the judgment-debtor who does not pay in stronger position to assail execution proceedings than any other who does pay. (*Macpherson & Dhavle JJ.*)

HARIHAR PRASAD SINGH vs. BHUBA-NESWAR PRASAD SINGH.

15 Pat. 422 = A.I.R. 1936 Pat. 270 = 162 I.C. 849 = 17 Pat. L.T. 195.

Or. 21, r. 2—Execution of money decree—Decree-holder agreeing that if certain lands transferred to him by judgment-debtor and certain amount paid to him, the decree would be fully adjusted—Such a contract if can be pleaded as an adjustment.

A decree-holder executing his decree agreed that if the judgment-debtor transferred some lands and paid a certain sum of money to him, the decree would be regarded as fully adjusted. The judgment-debtor neither transferred the land nor paid the sum agreed upon. *Held*, that the alleged adjustment could not be regarded as an adjustment at all within the meaning of Or. 21, r. 2, C. P. Code, so as to protect the judgment-debtor's interest from being sold in execution of the decree. The alleged adjustment was nothing more than a promise to cancel the decree if the judgment-debtor performed the conditions specified. 56 Mad. 198 applied. (*Baguley & Mosely, JJ.*)

S. T. R. M. CHETTIAR FIRM vs. ANDA-THAL.

A.I.R. 1936 Rang. 289.

Or. 21, r. 2(3) Payment not certified, if can be recognised.

Or. 21, r. 2(3) is mandatory and provides that a payment or adjustment which has

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not been certified shall not be recognised by any Court executing the decree. If there is a question of any payment in satisfaction of the decree or adjustment of the decree which has not been certified, it follows that the Court shall refuse to recognise it in execution proceedings. (*Wort J.*)

BANARSI LAL vs. BORHO SAHU.

A.I.R. 1936 Pat. 253 = 162 I.C. 482.

Or. 21, r. 2(3)—*Rule, if contemplates certification before objection is taken to execution on basis of adjustment.*

Sub-clause (3) of r. 2 of Or. 21, clearly contemplates certification before objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree or when the executing Court is about the business of execution, and as such it is too late to apply for certification under O. 21. It is too late when an objection is taken to the proceedings in execution to assert that there is an agreement which has not so far been certified. (*Wort, J.*)

BANARSI LAL vs. BORHO SAHU.

A.I.R. 1936 Pat. 253 = 162 I.C. 482.

Or. 21, r. 2(3)—*Right of decree-holder to execute decree when satisfaction of the same out of court not certified or recorded.*

When the alleged satisfaction of a decree has not been certified or recorded the decree holder has a right to execute the decree and he cannot be deprived of that right by the judge declining to proceed with his application for execution. (*Dunkley J.*)

M. R. M. CHETTIAR FARM vs. M. A. R. T. ARUNACHALIELANLAL.

A.I.R. 1935 Rang. 481.

Or. 21, r. 2(3)—*Agreement between judgment-debtor and decree-holder that balance of decree would be paid by instalments and decree-holder will not be entitled to interest—such agreement, if can be recognised unless certified.*

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Where part payment of the amount due under decree was made by a judgment-debtor and it was agreed between the parties that the balance of the decree together with another decree would be paid by instalments and no interest would be charged by the decree-holder, held, that the arrangement amounted to an agreement which was certifiable under Or. 2, r. 2, C. P. Code although only part of the decree was paid. Such an agreement affected the right of the decree-holder to execute the decree and it amounted to an adjustment and could not be recognised unless certified. 50 Mad. 897 & 56 Mad. 198 referred to. (*Wort J.*)

BANARSI LAL vs. BORHO SAHU.

A.I.R. 1936 Pat. 253 = 162 I.C. 482.

Or. 21, rr. 21 & 16—*Uncertified payment or adjustment, if may be pleaded or recognised in proceedings under r. 16 and to what extent.*

An uncertified payment or adjustment can be pleaded or recognised in a proceeding under Or. 21, r. 16, C. P. Code only as bearing upon the question whether the assignee of the decree is a benamdar of one of the several judgment debtors, or of the sole judgment-debtor, or of all the judgment-debtors. It cannot be pleaded by the judgment-debtor or recognised by the Court for any other purpose, for example, for showing or finding that the decree had been satisfied prior to the transfer. 55 Mad. 720 approved of; 31 C. W. N. 921 distinguished. (*R. C. Mitter J.*)

SAHEEDAN BIBI vs MIR ALI.

40 C.W.N. 301 = 62C. L.J. 316.

Or. 21, r. 11 & Or. 36, r. 6—*Order made at time of decree continuing interim attachment, if an order in execution.*

An order made at the time of the decree continuing an interim attachment—in the absence of any formal application for execution—cannot be treated as an order in execution entitling the Sheriff to a poundage even where such an order was followed by an application for the sale of the attached

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properties on the ground that they were perishable. (*Mc Nair J.*)

GRAHAMS TRADING CO. (INDIA) LTD.
vs. NARROTTAMDAS HARJEEBAFDAS.

40 C.W.N. 131.

Or. 21, r. 12(c)—*Decree for possession and mesne profits—future mesne profits, if can be claimed.*

A plaintiff who obtains a decree for possession of immovable property and for mesne profits, is entitled to recover from the defendant mesne profits upto the date of delivery of possession to him by the defendant. The fact that there is no mention in the decree as to the payment of future mesne profits is immaterial, and does not debar the plaintiff from claiming such profits. (*Varadachariar J.*)

MUTHYIA KONE vs. RAKAPPAN
AMBALAM.

70 M.L.J. 87=1936 M.W.N. 572=43
M.L.W. 514=A.I.R. 1936 Mad. 486=
163 I.C. 251.

Or. 21, r. 16—*Assignment of decree—requirements of—sale of a decree by court, if amounts to an assignment.*

No particular form of assignment is prescribed in the case of decree either under Or. 21, r. 16 or by any other provision of law. Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. Where therefore in a partnership suit, the Court for the purpose of protecting the assets of the partnership, itself sells a decree in Court by auction to the highest bidder from among the parties, a formal assignment in the sense of a document which in form purports to assign the decree by the Court acting on behalf of all the parties to the suit to the purchaser, is not necessary. (*Pandurang Row & Menon JJ*)

PERIAKATTA NADAR vs. MAHALINGAM.

71 M.L.J. 161=A.I.R. 1936 Mad. 543.
1936 M.W.N. 553=43 M.L.W. 336.

Or. 21, r. 16—*Adjustment prior to transfer satisfying decree, if may be pleaded—adjustment by contract between the original*

C. P. Code—(Contd.)

decree-holder and third person if may be pleaded when uncertified.

In the absence of any allegation of fraud or benami, an uncertified adjustment of the decree prior to the transfer, by a mortgage in favour of the original decree-holder executed by a third person of his own properties, cannot be pleaded by the judgment-debtor in a proceeding under Or. 21, r. 16, C. P. Code, whether the contract of adjustment was between the decree-holder and the third person alone, in which case the judgment-debtor is a stranger thereto, or whether he was a party to the arrangement in which case he could have then applied against the decree-holder to have the adjustment recorded. (*R. C. Miller J.*)

SM. SAHEDAN BIBI vs. MIR ALI & ANR.

40 C.W.N. 301=62 C.L.J. 316.

Or. 21, r. 18—*Decrees outstanding, in some Court, if must be necessarily set off against each other.*

Or. 21, r. 18, C. P. Code, does not provide that all decrees outstanding in the same Court must necessarily be set off against each other. It merely provides that when two rival application for execution are pending, execution must be carried out by satisfaction of the smaller decree and partial satisfaction to the same extent of the larger decree. (*Becket J.*)

KHAZAN CHAND vs. MOTI SINGH & ANR.

A.I.R. 1835 Lah. 914.

Or. 21, rr. 18-20—*Mortgage decree, if can be set off against simple money decree..*

A mortgage decree cannot be set off against a simple money decree under the provisions of Or. 21, rr. 18-20, C. P. Code. 14 A. L. J. 766 approved; 68 M. L. J. 722 dissented from; 33 All. 240 distinguished. (*Thom & Rachpal Singh JJ.*)

NAGESWAR RAM vs. RAJNET RAM.

1936 A.W.R. 405=1936 A.L.J. 562=
A.I.R. 1936 All. 639=162 I.C. 289.

Or. 21, r. 19—*Executing Court, if can grant set-off in cases not coming under Or. 21, r. 19.*

On general principles and in the exercise of its inherent power an executing

C. P. Code—(Contd.)

court can entertain and give effect to a claim to set-off even in cases which do not come strictly under Or. 21, r. 19 C. P. Code. (*Guho & Bartly JJ.*)

BANK OF DACCA, LTD. vs. GOURGOHAL SAHA.

A.I.R. 1936 Cal. 409.

Or. 21, r. 19—Decree directing payment of amount by plaintiff and execution of conveyance by defendant—deposit by plaintiff of amount less costs by way of restitution and interest—deposit, if valid.

A decree provided that the plaintiff was to deposit Rs. 500—in Court within a stated period and the defendant was thereupon to execute and get registered a deed of conveyance in plaintiff's favour. The plaintiff deposited in Court only Rs. 157-16as, that is to say, Rs. 500 less (1) the costs awarded by the decree, (2) certain other costs to which she was entitled by way of restitution and (3) interest on certain items of cost. The defendant contended that the plaintiff was bound to deposit the full amount of Rs. 500 and that in default of it, he was not entitled to the conveyance. *Held*, that the plaintiff was within his rights in making the deductions which he had made and depositing the balance only. The deductions made in the nature of cross demands arising out of the same transaction and under the same circumstances the doctrine of equitable set off held good. (*Venkata Subba Rao & Cornish JJ.*)

CHINNAMMAL vs. CHIDAMBARA KOTHANAR.

**71 M.L.J. 506=A.I.R. 1936 Mad. 626
165 I.C. 484=1936 M.W.N. 703=44
M.L.W. 34.**

Or. 21, r. 19—Auctioneer arbitrarily closing auction although bidder available—sale if liable to be set aside.

Where the auctioneer conducting an execution sale arbitrarily closed the auction either before or as soon as it was 4 o'clock although there was a bidder willing to purchase the property for a much larger sum than the price realised, *held*, that the auction of the auctioneer amounted

C. P. Code—(Contd.)

to a material irregularity in conducting the sale and the same was liable to be set aside. But where the property has not been sold at an inadequate price and the applicant has not sustained any substantial injury by reason of the irregularity in conducting the same, the sale will not be set aside. (*Addison & Abdul Raschid JJ.*)

HOSHNAK RAM vs. PUNJAB NATIONAL BANK LTD.

A.I.R. 1936 Lah. 555.

Or. 21, r. 19 & Sec. 47—Provisions of Or. 21, r. 19, if exhaustive in regard to questions covered by Sec. 47.

The provisions contained in Or. 21 C. P. Code, relating to cross-claims cannot and should not be taken to be exhaustive in regard to questions arising for consideration under Sec. 47 C. P. Code, relating to execution, discharge or satisfaction of decrees, (*Guho & Bartley JJ.*)

BANK OF DACCA, LTD. vs. GOURGOPAL SAHA.

A.I.R. 1936 Cal. 409.

Or. 21, rr. 21, 37 & 40—Execution of decree by arrest of judgment debtor—discretion of the Court

The Court is not bound to enforce execution of a decree by the arrest of the judgment-debtor in every case that the decree-holder applies for it. R. 37 of Or. 41, C. P. Code provides that when such an application is made, the Court may instead of issuing a warrant for the arrest of the judgment debtor issue a notice calling upon him to show cause why he should not be committed to the Civil prison. When the judgment debtor appears in pursuance of the notice, the Court has a discretion to disallow the application for arrest on any of the grounds specified in r. 40 of the said order, (*Srivastava & Nanavutty JJ.*)

JUGAL KISHORE vs. SATYA NARAIN SHUKLA.

10 Luck. 508.

Or. 21 r. 22—Assignee of decreeholder substituted with notice to judgment debtor

C. P. Code—(Contd.)

validity of assignment, if may be questioned or found against at later stage.

Where the question of the assignment of a decree has once been determined at a preliminary stage of the execution proceedings with notice to the judgment-debtor who has not appeared, and the assignee has been substituted in place of the original decree-holder the judgment-debtor is not entitled to contend and the Court is not entitled to find at a later stage that the assignment was collusive. (*D. N. Mitter & S. K. Ghosh J.J.*)

SAILENDRA K. CHOWDHURY vs. HARENDARA KUMAR ROY.

40 C.W.N. 1393.

Or. 20, r. 22—Decree against father and son—Son dying before execution—Execution taken out against father personally—Notice under r. 22, if necessary.

Where a decree is passed against father and son and the son dies before the institution of proceedings and execution is ultimately taken out against the father not as heir of his son but against him personally, it is not necessary to serve notices under Or. 21, r. 22, C. P. Code. (*Wort J.*)

BANARSI LAL & ORS. vs. BORHO SAHU.

A.I.R. 1936 Pat. 253=162 I.C. 482

Or. 21 r 22 (as altered by Lahore High Court)—Period of limitation for taking out execution.

Or. 21 r. 22 of the C. P. Code as altered by the Lahore High Court by notification No. 125 dated 7th Abrial 1932, extends the period in which execution must be taken out from one year to two years. (*Currie J.*)

HARO SINGH vs. LABH & ORS.

A.J.R. 1935 All. 962.

Or. 21, r. 29—Agreement regarding satisfaction of decree by assignee decree holder—breach of agreement—suit for damages—application for stay of execution of decree, if maintainable.

C. P. Code—(Contd.)

Where an assignee decree-holder having broken an agreement with the judgment debtor regarding the satisfaction of the assigned decree, the judgment debtor in a suit for recovery of damages applied for stay of execution of the defendant's decree during the pendency of the suit, held, that under Or. 21, r. 21, C. P. Code, the application for stay of execution of the decree was maintainable. (*Beasely C. J.*)

KARNAMMAL vs. MUTHUKUMARA-SWAMI CHEETI.

70 M.L.J. 120.

Or. 21, r. 29—Stay of execution by injunction—Court's order for attachment to continue—validity.

The judgment-debtors in an execution case, instituted a suit against the decree-holder and obtained an injunction in that suit restraining the decree-holder from proceeding with the execution till the disposal of the suit. The executing Court, thereupon dismissed the execution case, but ordered attachment to continue till disposal of the suit, in which the injunction was ordered. Held, that the order was not warranted by law but was merely a suspensory order keeping the execution case pending, but off the list of pending cases, only during the time that the title suit by the judgment-debtors remained pending. The decree-holder was entitled to put in an application for execution again which was to be considered as one to revive or continue the previous application for execution, if it was similar in nature and scope. (*Henderson & R. C. Mitter J.J.*)

KRISHNA KAMINI DEBI vs. GIRISH CHANDRA MONDAL.

63 Cal. 57=39 C.W.N. 1030=163 I.C. 654=A.I.R. 1936 Cal. 239.

Or. 21, r. 32—Plaintiff obtaining an injunction decree, if can ask for a special order embodying the terms of the decree.

Or. 21, r. 32 C. P. Code, does not contain any provision allowing a successful plaintiff in a suit for injunction to apply for the issue of a special order or notice embodying the terms of the injunction already embodied in the decree. It may be that the

G. P. Code—(Contd.)

Court has an inherent power to issue such a notice or order where the circumstances require it. But it does not appear that the party himself has a right to ask the Court to issue such a notice or make such an order and have it served through Court on the defendant. (*Pandrang Row J.*)

RANGAYYA NAIDU vs SUBBAYYA NAIDU.

71 M.L.J. 286=1936 M.W.N. 773=
44 M.L.W. 388=164 I.C. 668=A.I.R.
1936 Mad. 706.

Or. 21, r. 32(3)—Applicability of the rule—property attached for disobedience of injunction—sale of the property when permissible.

Or. 21, r. 32 (3), G. P. Code applies to both classes of injunctions, viz. mandatory as well as prohibitory. Under r. 32 (1), the property of a person who has once disobeyed a decree for a permanent prohibitory order may be attached, and the same may be sold under r. 32 (3), after the expiry of three months, and compensation awarded to the decree holder out of the sale proceeds. It is not necessary that there must be a second disobedience of the injunction after the attachment, before the property can be sold. (*Sulaiman C. J. & Bennet J.*)

NAWAB SINGH vs. MITHU LAL & ORS.
57 All. 858.

Or. 21, r. 35(2)—Decree for joint possession of immovable property—possession how may be delivered.

Where a decree is for joint possession of immovable property only, possession can be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming it by beat of drum or other customary mode. 16 A. L. J., 38 & 19 A. L. J. 469 referred to. (*Sulaiman C. J. & Bennet J.*)

MSR. MAHARAJI vs. BHAGABATI PRASAD.

1936 A.W.R. 69=160 I.C. 1073=1936
A.L.J. 80=96 A.I.R. 1936 All. 85.

Or. 21, r. 35(2)—Decree for joint possession—such possession if can be given

G. P. Code—(Contd.)

in any other manner than that provided in Or. 21, r. 35(2).

Joint possession, under a decree granting joint possession can only be delivered in the particular manner prescribed by the legislature in Or. 21, r. 35 (2). It is not within the competence of any body to attempt to give joint possession in any other manner, and if the patwari or any other person takes it upon himself to deliver such joint possession in a manner contrary to the express language of the legislature their action would not have any legal effect. 34 P. L. R. 839 relied on. (*Agha Haidar J.*)

BHAGAT RAM vs. ALI BAKSH.

[A.I.R. 1936 Lab. 749.

Or. 21, rr. 38 & 57—Decree directing property to be considered as under mortgage—Such property, if must be attached before sale can take place.

Where a decree directed that the property was to be considered to be under mortgage, and the judgment-debtor would not be entitled to alienate it, and the property was later sold in execution of the decree and it was contended that the sale was invalid inasmuch there had been no attachment of the property before the sale, *Held*, that it was not necessary that the property should be attached before being brought to sale in execution of the decree. (*Bhade J.*)

MATAB MAL JINDA SHAH vs. DARYA RAM GURANDITTA SURAM RAM KARAM CHAND

A.I.R. 1936 Lab. 573=160 I.C. 140

Or. 21, rr. 42 & 43—Preliminary decree for accounts if attachable in execution of another decree.

A preliminary decree for accounts in a suit for dissolution of partnership and accounts is not attachable in execution of another decree, against the plaintiff in the accounts suit. (*D. N. Mitter & S. K. Ghosh JJ.*)

SAILENDRA K. CHOWDHURY vs. HARENDRA K. ROY.

40 O.W.N. 1393.

C. P. Code—(Contd.)

Or. 21, r. 46—*Garnishee denying debt & objecting to jurisdiction of Court to order deposit in Court—subsequent suit by purchaser against garnishee—garnishee, if can raise objection in such suit.*

Where a garnishee denies the debt and objects to the jurisdiction of the Court to compel him to deposit the debt, but does not ask to have the matter investigated and there is no investigation or decision on the point raised by him, and the Court orders sale of the debt, the garnishee can raise the matter in a subsequent suit by the purchaser. (*Vivian Rose J.*)

JAGANNATH vs. JAMANBALLAABH.

A.I.R. 1936 Nag. 218.

Or. 21, r. 46(3)—“*Payment*,” meaning of—*payment contrary to attachment, if effective.*

The payment contemplated in Or. 21, r. 46 (3) is payment into the attaching Court so as to be available for the attaching decree-holder and not payment into the particular court house even when the payment is earmarked for some other purpose. Sec. 64, C. P. Code, provides that any payment to the judgment-debtor of the attached debt contrary to the attachment shall be void as against all claims enforceable under the attachment. The mere fact that a debtor of the attached debt does not pay money into the hands of the judgment debtor but to some body else will not make it any the less payment contrary to the attachment if payment is made at the instance of or for the benefit of the judgment-debtor. Where therefore such a debtor pays the amount not in the attaching Court, but in another Court, not under compulsion on behalf of the judgment-debtor, such payment is not sufficient to discharge him from his liability to the attaching creditor. (*Varadachariar J.*)

NARAYANASWAMI AYYAR vs. A. MALLU.

A.I.R. 1936 Mad. 251 = 71 M.L.J. 243 = 161 I.C. 473 = 8 R.M. 529 = 43 L.W. 713 = 1936 M.W.N. 147.

Or. 21, r. 53; Or. 23, r. 10 & Or. 34, r. 4(2)—*Simple money decree-holder who has attached preliminary mortgage*

C. P. Code—(Contd.)

decree obtained by his judgment-debtor, if can apply for preparation of final decree.

Where the appellant, a simple money decree holder attached a preliminary mortgage decree obtained by his judgment debtor, and then applied for the preparation of a final decree, held, that the appellant had no *locus standi* to apply for the preparation of a final decree. (*Bennet & Ganganath JJ.*)

RAM KUMAR RAMESHWAR LAL vs. PREM SUKH DAS.

1936 A.L.J. 1154 = 1936 A.W.R. 986 All. 857.

Or. 21, r. 57—*Death of decree-holder pending decision of objection to execution by judgment-debtor—Application for substitution by some of representatives of decree-holder—Order consigning record to record-room—effect.*

On the death of a decree-holder pending decision of objections raised by the judgment-debtor, an application was made by certain persons as the heirs and legal representatives of the deceased decree-holder praying that they be allowed to carry on the execution proceedings. The Court found on evidence adduced by the judgment-debtors, and on admission of the applicants themselves that they were not the only heirs of the deceased decree-holder and there were other legal representatives and thus passed an order consigning the record to the record room.

Held, the order consigning the record to the record-room was erroneous, and the Court should have got the application for substitution amended by adding the names of the other decree-holders. But the order was not in effect an order of dismissal, of the petition of execution, and it could not have the effect of terminating the prior attachment. (*Tek Chand J.*)

MANGAL SINGH vs. SAGAR.

A.I.R. 1936 Lah. 873.

Or. 31, r. 58—*Question as to whether a person is representative of judgment-debtor, in objection case, if comes under Sec. 47.*

C. P. Code—(Contd.)

The question whether a person is representative of the judgment debtor is a question coming within Sec. 47, C. P. Code, and therefore, whether it was incumbent upon the objector to bring an action contemplated by Or. 21, r. 58, C. P. Code, is quite beside the point. (*Wort A. C. J. & Dhavle J.*)

KHARTAR SHAH & ANR. vs. SHYAM LAL SINGH & ANR.

163 I.C. 38 = A.I.R. 1936 Pat. 616.

Or. 21, r. 58—*Objection by judgment-debtor that land attached, is held by him on behalf of deity if falls under Or. 21, r. 58.*

Or. 21, r. 58 applies in all instances in which the judgment-debtor makes the objection not in his personal capacity but in a representative capacity, that is, when he claims to be holding the land on behalf of somebody else, and not merely to a case when the objection is made by a shewait or a mutwail or a trustee. Where, therefore the judgment-debtor on an attachment of certain lands of which he was in possession objected to the attachment on the ground that the land was debuttar and he held it by virtue of performance of certain sacrifices to the temple for service of which the land was dedicated, held, that his objection fell under Or. 21, r. 58, C. P. Code and not under Sec. 47. The order passed on such objection was therefore not appealable (*James J.*)

BARARI CO-OPERATIVE BANK LTD vs. SINGHESWAR JHA.

A.I.R 1936 Pat. 256.

Or. 21, r. 58, & 63—*Suit for declaration if can be brought when relief in plaint can be obtained by attachment.*

Where the relief in the plaint can be obtained expeditiously and chiefly by way of attachment of a property, it is not proper for the Courts to entertain a suit for declaration by the plaintiff as to his right in the property. (*Beaumont C. J.*)

JAMNABAI GUJRATI GULAB CHAND vs. DATTATRAYA RAM CHANDRA GUJRATI.

60 Bom. 226 = A.I.R. 1936 Bom. 160 = 162 I.C. 260 = 35 Bom. L.R. 251.

C. P. Code—(Contd.)

Or. 21, r. 58-63—*Garnishee denying existence of a debt order rejecting garnishee's objections—suit by decree-holder against garnishee—court, if can go into the question of existence of assets in garnishee's hands.*

When a garnishee merely denies existence of assets sought to be attached in execution of a decree, and an order is made disallowing that objection, that order does not come within the purview of Or. 21, rr. 58-63, C. P. Code. 27 Mad. 44, M. L. J. 585, and 38 Bom. 631 distinguished, (*Burn & Menon JJ.*)

ATMA KURU BUTCHAYYA CHETTY vs. CHAKRAM KRISHNAMACHARI.

59 Mad. 966 = 70 M.L.J. 20 = 1936 M. W.N. 54 = 43 M.L.W. 68 = A.I.R. 1936 Mad. 152 = 160 I.C. 534.

Or. 21, r. 58 & Sec. 11—*Creditor attaching property of judgment-debtor in execution of his decree—Judgment debtor's objection dismissed and order made final—Same property if can be attached and sold again in execution of decree held against the judgment-debtor by another creditor.*

Where the share of a person in certain property is attached by a creditor in execution of a decree against him, and on his objection to the attachment being dismissed, his share is sold, and the order dismissing his appeal becomes final, he has no interest left in that property and consequently it is not liable to a subsequent attachment and sale as his property in execution of a decree against him by another creditor who must be deemed to be his representative. 1939 A. L. J. 1001 relied on. (*Ganjana Nath J.*)

RAMJIWAN vs. INDER BAHADUR SINGH.

1936 A.L.J. 295 = 163 I.C. 239 = 1936 A.W.R. 447 = A.I.R. 1936 All. 722.

Or. 21, R. 58, & Sch. II—*Objection under O. 21, r. 58, if can be referred to arbitration.*

An objection under Or. 21, r. 58, C. P. Code is a proceeding in execution, and the

C. P. Code—(Contd.)

provision of Sch. 2, C. P. Code, are not applicable to it. Accordingly the Court has no jurisdiction to refer an objection under Or. 21, r. 58 to arbitration. (*Collister Bujpai JJ.*)

SARJOO LAL BEHARI LALL vs. SURH-DEO PROSAD:

1936 A.W.R. 251 = 161 I.C. 107 = 1936 A.L.J. 142 = A.I.R. 1936 All. 378.

Or. 21, rr. 58 & 63 and Limitation Act, Sch. I, Art. 11—Dismissal of claim case—sale in execution set aside on satisfaction—subsequent suit for declaration of title beyond one year, if barred.

When an order is made on an application under Or. 21, r. 59 dismissing a claim but the sale itself held in execution proceedings is set aside and the attachment *ipso-facto* comes to an end, a subsequent suit brought beyond one year by the claimant for declaration of his title is not barred under Art. 11, Sch. I of the Limitation Act and the execution proceedings came to an end within or beyond one year of the date of the order in the claim case. 48, M. L. J. 616, referred to. (*Nasim Ali & Henderson JJ.*)

BAMAPADO BANDOPADHAYA vs. RAMANATH MANDAL

40 C.W.N. 146 = 165 I.C. 84.

O. 21, r. 59—Mortgagee after attachment if can prevent sale by making necessary deposit under rule.

A person who has obtained mortgage of a property after it has been attached, can, under Or. 21, r. 59, C. P. Code, (as amended by the Lahore High Court), come forward and by making the necessary payments under r. 59, save the property and prevent its sale from taking place. (*Agha Haidar J.*)

JAMNA DAS vs. JALAL DIN.

A.I.R. 1936 Lah. 561.

Or. 21, rr. 60 & 63—Application for removal of attachment on the ground that property belongs to applicant—Sale deed in favour of applicant appearing invalid—Court if must go into question of validity or otherwise of the deed.

C. P. Code—(Contd.)

Where a person applies under Or. 21, r. 60, C. P. Code, for removal of attachment of certain property on the ground that the property belongs to him by virtue of a deed of sale executed in his favour by the Judgment-debtor, but it appears on the facts appearing on the face of the sale deed itself that the sale is invalid and does not pass any title in the property, the Court must, in order to decide the application for removal of the attachment come to a decision as to the validity of the deed of sale where by the property attached is purported to be conveyed from the judgment-debtor to the claimant. The failure of the Court to consider the question of validity or other wise of the sale deed and its refusal to go into the question of title amounts to a failure to, exercise jurisdiction vested in it by law, within the meaning of Sec. 115, cl. (c), C P Code. 15 Cal. 521 & 34 C. W. N. 254 relied on; 14 Cal. 617 & 29 Cal. 543 distinguished (*Dunkley J.*)

VEDNATA SINGH & ANOTHER vs. U BA DIN.

14 Rang. 516 = 164 I.C. 608 = A.I.R. 1936 Rang. 306.

Or. 21, r. 64—Claim case dismissed by executing Court—claimant bringing declaratory suit—onus of proof.

When an executing court dismisses a claim under Or. 21, r. 61, C. P. Code, the decision is final as to the right asserted till it is displaced by the result of a civil suit.

When the claimant brings such a declaratory suit, he must prove that he has the right which he claims. (*Courtney Terrell, C. J. & James J.*)

RADHA KISHUN vs. KEOLA PROSAD.

17 P.L.T. 785.

Or. 21 r. 61—Objection by mortgagee to execution sale dismissed—Remedy of the mortgagee.

Where an objection by a mortgagee in possession to the sale of the mortgaged property in execution of a simple money decree is dismissed under Or. 21 r. 62, C. P. Code, the remedy of the mortgagee is to bring a regular suit for the enforcement of his mortgage, and it is not open to him to sue for recovery of his mortgage money under Sec.

C. P. Code—(Contd.).

Sec. 68 (1) (d), T. P. Act. That section has no application to a case where the dispossession of the mortgagee from the mortgaged property is due to the mortgagee's own default, and no disturbance of possession is made by the mortgagor. (*Srivastava J*)

BHARAT RAM vs. BENI DUTH.

1936 O.W.N. 454=161 I.C. 821(2)
=A.I.R. 1936 Oudh 263.

Or. 21, r. 63—Joinder of possible parties.

The plaintiff obtained a decree against respondents 3 & 4 and in execution of the decree attached certain property. Objection to the attachment having been taken by respondents 1 & 2, the attachment was removed. Plaintiff thereupon filed a declaratory suit under Or. 21, r. 63 against the objectors, and in that suit joined respondents 3 & 4 as defendants. Objection was taken to the joinder on the ground that the declaratory suit was based on the cause of action of removal of attachment and to the proceedings for removal of attachment and therefore respondents 3 & 4 were not necessary parties. *Held*, that although not necessary parties they were possible and proper parties to the suit and the joinder was therefore valid. (*Mya Bu & Baguley J.*)

S. N. V. R CHETTAB FIRM vs. MA LAY & ORS.

A.I.R. 1936 Rang. 56=161 I.C. 950.

Or. 21, r. 63—Person getting goods released from attachment by suit under Or. 21, r. 63 suing for damages for wrongful attachment—Facts that must be proved.

A person whose goods have been attached and who in a claim suit under Or. 21, r. 63, C. P. Code, has succeeded in getting a declaration that the goods be released from attachment, can maintain a suit for damages for wrongful attachment and in order to entitle him to the full indemnity for the wrongful attachment, he is not bound to allege and prove that the defendant had resisted his objection maliciously or without proper cause. If the goods had been

C. P. Code—(Contd.)

sold under the Court's order, the difference in the market value of the goods at the time of the attachment and their price when they were sold, the selling price having fallen intermediately, must be added to the damages. 17 Cal. 436 followed. (*Tekchand & Dalip Singh JJ.*)

JAWAHAR MAL vs. PUNJAB NATIONAL BANK LTD., SARGODHA,

17 Lah. 668=A.I.R. 1936 Lah. 524.

Or. 21, r. 63—Suit by decree-holder claiming right to attach property and suit by objector claiming release from attachment—Title to property in dispute, if required to be proved in either case.

Or. 21, r. 63, C. P. Code, lays down that where a claim or an objection is preferred under the preceding rule of Or. 21, the party against whom an order is made may institute a suit to establish 'the right which he claims to the property in dispute'. Obviously these words do not mean that the plaintiff has to establish his ownership of the property in dispute. All that he is required to do is to establish "the right which he claims to the property in dispute". If the suit has been instituted by the decree-holder against whom an order has been passed under r. 60 releasing the property from attachment, the right which he claims under the suit is the right to have the property attached in execution of the decree against the judgment-debtor. If, on the other hand, the plaintiff is the objector who has been unsuccessful in the objection proceedings before the execution Court, the right which he claims in the suit is the right to have the property in dispute released from attachment, it not being the property of the judgment-debtor. In either case, it is clear that it is not necessary for the plaintiff to establish his own title in the property in question, but what he has to establish is, in the first case, the claim to have it realised from attachment. 15 Cal. 674 & 3 C. L. J. 381 followed. (*Tekchand & Dalip Singh J.*)

JAWAHAR MAL vs. PUNJAB NATIONAL BANK LTD., SARGODHA,

17 Lah. 668=A.I.R. 1936 Lah. 524.

C. P. Code—(Contd.)

Or. 21, r. 63—*Suit by one creditor to establish right to attach and sell certain property by avoiding a fraudulent transfer—Such suit, if must be brought in representative capacity—Objection as to form of suit, if can be raised for the first time in appeal.*

Where a suit is brought under Or. 21, r. 63, C. P. Code by an attaching creditor to establish his right to attach and bring to sale certain property by avoiding a transfer of the property on the ground that it has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought in the form of a representative suit. And if it is not so brought but is brought by one creditor in his individual capacity, the Court may direct the plaintiff to take proper steps to put matters right. When, however, no objection has been taken as to the form of the suit in the trial court but the objection is raised for the first time in the appellate Court, the objection cannot be allowed. (*Mya Bu & Baguley JJ.*)

ASGHAR ALI vs. C. V. R. M. FIRM.

14 Rang. 81=A.I.R. 1936 Rang. 117=
161 I.C. 887.

Or. 21 r. 63—*Sale deed by judgment debtor in favour of plaintiff held voidable—Whether plaintiff can plead that decree-holder not entitled to sell property by reason of bar contained in Or. 34, r. 14.*

In a suit for sale on a mortgage, the mortgagee made a statement relinquishing the mortgage security and prayed for a simple money decree which was accordingly passed in his favour. In execution of this decree he attached the mortgaged property. An objection under Or. 21, r. 14, C. P. Code, was filed by the plaintiff alleging that the property sought to be attached had been sold to him. On his objection being dismissed, he brought a suit under Or. 21, r. 63, C. P. Code for a declaration that the defendant was not entitled to put up the property to sale. *Held*, that the decree which the defendant obtained was in satisfaction of a claim arising under the mortgage and his mere declaration that he gave up the mortgage security, unsupported since it was of no consideration might not be capable of enforcement and could not be regarded as an extinguishment of the

C.P. Code—(Contd.)

mortgage rights. Accordingly, the power contained in Or. 34, r. 14, C. P. Code, was applicable. *Held*, further, that on the finding that the sale deed in favour of the plaintiff was liable to be avoided, the plaintiff had no locus standi to ask for a declaration that defendant was not entitled to put up the property to sale by reason of the provision of Or. 34, r. 14, C. P. Code. (*Harris & Bajpai JJ.*)

SHAUKAT ALI vs. SHEO GHULAM

1936 A.L.J. 692=1936 A.W.R. 510=
165 I.C. 124=A.I.R. 1936 All. 663.

Or. 21, r. 65—*Court if can offer property to person offering a higher amount after the property is knocked down.*

When the officer of the Court or such other person as the Court may appoint to conduct a sale as provided in Or. 21, r. 65, C. P. Code, knocks down the property to the highest bidder, such person must be deemed to have been declared to be the purchaser of such property. The sale is complete when the property is knocked down to the highest bidder. And the Court cannot refuse to declare the highest bidder to be the purchaser and cannot offer the property to a person who may be prepared to offer a higher price than the amount at which the property has been knocked down. 131 I. C. 227 & 29 N. L. R. 52 followed. (*Addison & Abdul Raschid JJ.*)

HOSHNAK RAM vs. PUNJAB NATIONAL BANK LTD.

A.I.R. 1936 Lah. 555

Or. 21, r. 71—*Decree-holder auction-purchaser failing to deposit purchase money—Rival decree-holders, if may apply for realising deficiency of price on re-sale from the defaulting decree-holder.*

The term "decree-holder" in the expression "at the instance of either the decree-holder" in Or. 21, r. 71, C. P. Code, is intended to mean the decree-holder who brought the property to sale, and not all the decree-holders entitled to share rateably under Sec. 73, C. P. Code. So, where a decree-holder auction-purchaser fails to deposit the purchase money and the property is resold, it is not open to a rival decree-holder under Or. 21, r. 71, C. P.

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Code, to apply for the realisation of the deficiency in price resulting from the resale from the defaulting decree-holder. (*King O. J. & Nanavutty JJ.*)

MOHAMMAD SALAMATULLAH vs. MURLIDHAR.

1936 O.W.N. 559 = A.I.R. 1936 Oudh. 277 = 163 I.C. 175(2).

Or. 21, r. 72(2) & 84(2)—Application of the provisions of the Rules.

Or. 21, r. 84(2), C. P. Code, must be construed in such a way as to the consistent with r. 72(2) and r. 85, proviso of the same Order. (*Venkata Subba Rao J.*)

A. M. A. MURUGAPPA CHETTIAR vs. S. M. RAMASWAMI CHETTIAR,

59 Mad. 342.

Or. 21, r. 83(3)—Execution transferred to Collector—Subsequent application to Court for permission to transfer under r. 83, if maintainable.

Or. 21, r. 83, C. P. Code does not apply to the case of a sale in enforcement of a mortgage decree. An application to the Court for permission to transfer under Or. 21, r. 83, C. P. Code, subsequent to an order transferring execution proceedings to the Collector is irregular and entirely misconceived and cannot affect the validity of the order of transfer to the Collector. (*Srivastava & Nanavutty JJ.*)

BHOLANATH vs. MAHRANI KUR.

1936 O.W.N. 489 = 1936 O.L.R. 242 = A.I.R. 1936 Oudh 280 = 162 I.C. 362.

Or. 21, r. 89—House mortgaged sold in execution of a decree—mortgage, if can apply to set aside sale.

Where the property sold in execution of a decree is a house, and the house is mortgaged the mortgagee certainly has an interest in the house and is entitled to make an application to have the sale set aside under Or. 21, r. 89, C. P. Code. (*King & Nanavutty JJ.*)

NARAIN DAS & ANB. vs. BULAKUL.

1936 O.W.N. 48 = 159 I.C. 1044(2) = A.I.R. 1936 Oudh 128.

C. P. Code—(Contd.)

Or. 21, r. 89—Execution sale—Circumstances showing applicant's readiness to deposit sum—Application, if may be entertained.

Where an application under Or. 21, r. 89, C. P. Code, for setting aside a sale is made and the circumstances of the case show that the applicant is ready to deposit the sum required, the Court can entertain the application always provided that the applicant has an interest by virtue of title. The application and the deposit must however both be made within 30 days. (*Wort, J.*)

NASIRUDDIN vs. HAKIM MOHAMMAD TAHIR.

A.I.R. 1936 Pat. 119 = 161 I.C. 26.

Or. 21, r. 89 & Sec. 115—Sale in execution of a decree set aside on deposit of money—Order setting aside sale affirmed by appellate Court—Money actually deposited by third party to whom house was agreed to be sold—Order of the appellate court, if open to revision.

A certain property was sold in execution of a decree, but the sale was set aside by the executing court under Or. 21, r. 89, C.P. Code on a deposit of money for payment to the decree-holder and the auction-purchaser. Subsequently the order setting aside the sale was confirmed in appeal. The auction-purchaser thereupon applied to the High Court for revision of the said order on that the ground the amount deposited in the Court was not by the judgment debtor but by a third party with whom the judgment debtor had entered into an agreement for sale. *Held*, that the lower court had jurisdiction to decide whether or not the third party to whom the judgment-debtor had agreed to sell the property was entitled to make an application under Or. 21, r. 89, and the Court could not be said to have acted in the exercise of its jurisdiction illegally or with material irregularity. (*Nanavutty J.*)

1936 O.W.N. 344 = 161 I.C. 424.

SANKAR PERSHAD vs. MOHAMMAD TAQI.

Or. 21, r. 90—Commencement of sale after the appointed hours and after the intending bidders had departed—Effect of.

C. P. Code—(Contd.)

In a sale proclamation it was stated that the sale would commence at 10 o'clock but the officer who was to conduct the sale reached the spot in a leisurely fashion at 12 o'clock, with the result, that the intending bidders had departed after waiting. *Held*, that under the circumstances there was no proper competition in bidding, and the sale was not properly and regularly conducted and ought to be set aside. (*Agha Haidar J.*)

DATA RAM vs. PUNJAB NATIONAL BANK LTD.

38 P.L.R. 515.

Or. 21, r. 90—*Holding of sale on day subsequent to that date for which it was advertised, if legal.*

The holding of a sale on a day subsequent to the date for which it was advertised, on the ground of want of time, there being several other sales fixed for that date, is not illegal. (*Saunders J.*)

NAND KISHORE SINGH vs. NAGENDRA BALA DEEL.

17 P.L.T. 712.

Or. 21 r. 90—*Decree-holder applying for rateable distribution—Subsequent application for setting aside sale—Failure to establish that application for rateable distribution was made before receipt of assets by Court—Application for setting aside sale, if maintainable.*

Where a decree-holder who has made an application under Sec. 73, C. P. Code for rateable distribution of assets makes an application under Or. 21, r. 90 for setting aside the sale, he must establish that he had made the application for rateable distribution before the receipt of the assets by the Court. If he fails to establish this point, his application under Or. 21, r. 90, C. P. Code cannot be maintained. (*Tham & Raghpal Singh JJ.*)

BEHARI LAL vs. ALI NABI & ORS.

1936, A.W.R. 489 = 1936 A.L.J. 559 = A.I.R 1936 All. 626 = 162 I.C. 349.

Or. 21, r. 90—*Application to have sale set aside by person whose interests are affected*

C. P. Code—(Contd.)

-person obtaining order of attachment before judgment, subsequently obtaining decree-right to apply when attachment defective.

A person who has obtained an order of attachment before judgment is entitled under Or. 21, r. 90, C. P. Code, to apply to have a sale in execution of another decree set aside, if he has obtained a decree before the date of the sale even though the attachment made in pursuance of the order for attachment was defective. (*R. C. Mitter J.*)

GOBINDA PROSAD DALAL vs. RRIN-DABON CHANDRA NASIPURI.

40 C.W.N. 1338 = 63 C.L.J. 560.

Or. 21, r. 90—*Two properties sold in Court auction under same decree—sale if can be set aside in respect of one of the properties due to grossly inadequate price fetched.*

In execution of a decree two properties were sold in Court auction. The judgment-debtor sought to set aside the sale of one of the properties on the ground of inadequacy of price fetched due to certain irregularity in the publication of the sale notices. It was contended that the sale could not be set aside only in part. *Held*, that Or. 21, r. 90, C. P. Code is very clear and expressive and under the provisions of that rule the sale could be set aside only in respect of the property which fetched inadequate price; it could not be set aside in respect of the property of which the price realised was not inadequate.

KARUMOORI NARASINGMURTHI vs. OFFICIAL RECEIVER.

59 Mad. 438 = A.I.R. 1936 Mad. 121 = 43 M.L.W. 32 = 160 I.C. 645.

Or. 21, r. 90 & 91—*Sale of immovable property in which Judgment-debtor has no interest at date of sale—Effect of—Rights of the decree-holder purchasing the property.*

A sale of immovable property in which the judgment-debtor has no interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing court or void as between the judgment-debtor and the decree-holder or auction purchaser. A decree-holder who pur-

C. P. Code—(Contd.)

chases the property at the sale cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not in fact satisfied his decree to the extent of the sale price unless he has the sale set aside by applying under Or. 21, r. 91, C. P. Code. (*Courtney Terrel, C. J. Dhavle & Agarwalla J.J.*)

SURENDRA KUMAR SINHA vs. SRICHAND MAHATI.

15 Pat. 308=A.I.R. 1936 Pat. 97=160
1049=16 Pat. L T 908.

Or. 21 rr. 90 & 92—Application to set aside sale dismissed and sale confirmed—auction purchaser not made party within time—appeal is liable to be dismissed.

An application to set aside a sale in execution of a decree under Or. 21, r. 90, C. P. Code having been refused and the sale confirmed, an appeal was taken against the order but the auction purchaser was not impleaded as respondent. When he was sought to be impleaded the time for filing the appeal had expired. *Held*, that under Or. 21, r. 92, C. P. Code the auction purchaser was a necessary party and the failure to implead him within time rendered the appeal liable to be dismissed. (*Young C. J. & Monroe J.*)

RAM LAL vs. KEDAR MATH.

A.I.R. 1936 Lah. 478=163 I.C. 698.

Or. 21 r. 90 Or. 43, r. 1 (j)—Execution sale—order setting aside sale for failure to make deposit and for accepting improper bid—second appeal if lies,

An order by the appellate Court setting aside an auction sale in execution of a decree for failure to deposit 25 per cent of the purchase money in the first instance and the balance later, and for accepting an improper bid comes within the purview of Or. 21, r. 90, C. P. Code. A second appeal from such an order is barred by Or. 43, R. 1 (j) of the Code. (*Din Mohammed J.*)

MST. MEHR BANO vs. SHEER MOHAMMED.

38 P.L.R. 839=A.I.R. 1936 Lah. 969=
163 I.C. 765.

Or 21 r. 90 & Or. 43 r. 1(j)—Order rejecting judgment debtor's application

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under Or. 21 r. 90—Second appeal, if lies from order dismissing application.

No second appeal lies from an order rejecting an application by the judgment debtor under Or. 21, r. 90 C. P. Code, for setting aside a sale, even where the purchaser is the decree-holder himself, (*Sulaiman C. J. & Bennet J.*)

DEBI CHARAN LAL vs. KHUSAL RAI RATAN LAL.

1936 A.W.R. 869=1936 A.L.J. 959=
165 I.C. 654=A.I.R. 1936 All. 763.

Or. 21 r. 92—Judgment-debtor declared insolvent, if can appeal from an order confirming sale of his property,

A judgment-debtor who has been adjudicated an insolvent is not competent to prefer an appeal from an order confirming the sale of his property in execution of a decree. (*Bhide J.*)

MUNI LALL & ORS vs. BARIDOAB BANK LTD., HOSHIARPUR.

38 P.L.R. 108=162 I.C. 299=A.I.R.
1936 Lah. 386.

Or. 21 rr. 91 & 92—Sale in execution of decree—warranty of title if any—rights of the the auction purchaser.

At a Court sale in execution of a decree there is no warranty of title of any kind given to the auction-purchaser by anybody so there can be no equity in favour of the auction purchaser to claim a refund of his purchase money when it is found that the judgment-debtor had no title and consequently the auction purchaser is deprived of the property. Rule 91 of Or. 21, of the Code gives the auction purchaser a special remedy in such cases, but if no application is made within 30 days and the sale is confirmed, then by r. 92 (3), a civil suit to challenge the order of confirmation is absolutely barred. (*Sulaiman C. J. & Gangannath J.*)

MANGAI SEN vs. MATHURA PRASAD.

67 All. 690.

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O. 21 r. 92—*Order confirming sale, if root of auction-purchaser's title or title perfected on expiry of 30 days from sale without any application questioning same being filed.*

After the expiry of 30 days from an execution sale during which no application questioning the same is filed, the title of the auction-purchaser becomes unimpeachable. The Court in such a case is bound to confirm the sale, the sale certificate being only a formal document of title, and there is no special period within which an order for confirmation must be applied for. (*Sir Shadilal*.)

JAGANNATH RAO GARU vs. MOHIPANI SURYA RAO.

40 C.W.N. 1130 = A.I.R. 1936 P.C. 204.

Or. 21, r. 92 & Or. 43 r. 1 (j)—*Second appeal, if lies from an order refusing to set aside sale.*

No second appeal lies from an order passed by an appellate Court upholding an order passed by an executing Court, refusing to set aside a sale. (*King O. J., & Zia-Ul-Hasan J.*)

MST. BHOONA vs. BADRI PROSAD,

1936 O.W.N. 137 = 160 I.C. 468 = A.I.R. 1936 Oudh 172.

Or. 21 r. 93—*Property purchased at auction sale—subsequent suit by third party claiming share in the property decreed—auction purchaser, if can claim refund of purchase money from decree-holder.*

Where property is purchased at an auction sale and after the confirmation of the sale, a third party brings a suit for possession claiming share in the property in question and obtains a decree for possession, the auction-purchaser cannot claim a refund of the money paid at the auction sale from the decree-holder. It is only the right and title of the judgment debtor which passes to the auction-purchaser and the auction purchaser takes that right and title subject to any claims which may subsequently be made by third parties. (*Bennet J.*)

MUST IDIN vs. LACHEMI NARAIN & ANR.

1936 A.W.R. 952 = 1936 A.L.J. 1196.

C. P. Code—(Contd.)

Or. 21, rr. 95 & 96—*Delivery of possession—tenant in occupation—right of the landlord.*

Where an application is made for actual vacant possession under Or. 21, r. 95, C. P. Code, and the result of all the objections raised is that the outstanding dispute that remains in the right of the tenants, the result is that the delivery so far as the landlord's right is concerned is effected and what is not completed is the right to actual possession asserted by the tenant. (*Ramesam & Cornish JJ.*)

VENKATA KRISHNAYYA & ORS vs. VENKATANARAYANA & ORE.

A.I.R. 1936 Mad. 733

Or. 21, rr. 97 & 100—*Enquiry under the section, if can be started, when no complaint made by a decree-holder to the delivery of possession.*

When no complaint about resistance or obstruction to possession has been made by a decree-holder, it is not open to the executing Court to start an enquiry under Or. 21, r. 97, C. P. Code at the instance of prospective resisters. (*Subhedar A. J. C.*)

JAGANNATH vs. FASIUDDIN.

31 N.L.R. 480.

Or. 21, r. 103—*Title of plaintiff affirmed in a suit—Defendant relying on a mortgage by a third person while in wrongful possession of the property—Plaintiff, if entitled to succeed.*

The plaintiff brought a suit for possession under Or. 21, r. 103, C. P. Code. The defendant resisted the suit on the allegation that the property had been mortgaged to him by a third person and the plaintiff had no right to the same. It appeared that the third person referred to by the defendant had been in wrongful possession of the property when he had mortgaged the same to the defendant. In a previous suit between the plaintiff and the third person, the plaintiff had obtained a decree wherein his title to the property had been affirmed. Held, that the plaintiff's claim having been founded upon title and the defendant having failed to prove his adverse and proprietary

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possession for a period of more than 12 years, the plaintiff was entitled to a decree for possession. 39 Mad. 617 relied on; 16 Lah. 442 distinguished, (*Agha Haidar J.*)

ISHAR DASS vs. GANPAT RAI.
A.I.R. 1936 Lah. 530.

Or. 21. r. 107 (as amended by the Oudh Chief Court)—Right of appeal from an order passed under the rule,

Or. 21, r. 112, C. P. Code allows an appeal from an order passed in proceedings under Or. 21. r. 107, C. P. Code, as amended by the Oudh Chief Court, but no right of second appeal is allowed under the Code. (*King C. J. & Nanavutty J.*)

LACHMAN PRASAD vs. MUHAMMED YUNUS.

1691 C. 42 = 1936 O.W.N. 114 = A.I.R. 1936 Oudh 167.

Or. 22. r. 2.—Transfer of joint property by one of five brothers—suit for possession against transferee by all the brothers—Death of one of the brothers during pendency of suit—Suit to what extent abates.

The rule of joint ownership and survivorship as understood by the Benares School of Hindu Law does not apply to Jat agriculturist. They enjoy the family property as tenants in common. Where therefore one of five Jat brothers transferred the joint property and the other brothers sued for recovery of possession, and during the pendency of the suit one of the five brothers died but his legal representative was not brought on record held, that the suit abated only as regards the share of the deceased brother and did not abate as a whole. (*Agha Haidar J.*)

KEHR SINGH & ORS. vs. CHANDA SINGH & ORS.

A.I.R. 1936 Lah. 578 = 164 I.C. 971.

Or. 22, rr. 2, 3 & 4—Suit if abates on the death of a plaintiff or defendant where the whole interest of the deceased is represented by surviving plaintiffs or defendants.

Where on the death of a plaintiff or defendant, the whole interest of the

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deceased is represented by surviving plaintiffs or defendants, the provision applicable is Or. 22, r. 2, C. P. Code, and not Or. 22, rr. 3 & 4 of the Code. There is no question of abatement in such a case. (*Macpherson & Khaja Mohammad Noor JJ.*)

SANKRU MAHTO & ORS. vs. BHOJU MAHTO & ORS.

15 Pat. 326 = 165 I.C. 612 = A.I.R. 1936 Pat. 584 = 17 P.L.T. 584.

Or. 22, r. 3—Scope and extent of the rule.

Or. 22, r. 3, C. P. Code deals with substitution after the death of a party, and has no application to a case in which a party comes in, not as legal representative of a deceased party, but as an assignee from him. (*Khaja Mohammad Noor & Saunders, JJ.*)

GOBORDON MUKHERJEE vs. SALIGRAM MARWARI & ORS.

18 Pat. 82 = 17 P.L.T. 73 = 159 I.C. 828.
= A.I.R. Pat. 123.

Or. 22, r. 3—Death of some of the plaintiffs after preliminary decree for ascertainment of mesne-profits passed—substitution not made in time—suit, if abates.

Where, after a preliminary decree in a suit has been passed and an order made directing the ascertainment of mesne profits, some of the plaintiffs die, the suit does not abate by reason of the non-substitution of the legal representatives of the deceased plaintiff within the time limited by law. 57 Cal. 285, & 51 Mad. 701 relied on; 52 All. 910 dissented from. (*Guha & Bartley JJ.*)

PRIYABALA DASSI vs. SARAJUBALA CHOWDHURANI

A.I.R. 1936 Cal. 540.

Or. 22, rr. 3, 4, 8 & 12—Rules regarding abatement if applicable to appeals against orders made in execution proceedings.

An appeal against an order made in execution proceedings cannot be held to

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be a mere continuation of the execution proceedings, but are entirely separate proceedings, to which the rules of abatement in Or. 22, C. P. Code are applicable. Such an appeal, therefore, abates in toto on the death of a respondent, where the deceased respondent's interest is not divisible from the rest and the right to sue does not survive against the surviving respondent's alone, and the legal representatives of the deceased are not brought on the record within time. (*Addison & Abdul Rashid JJ.*)

CHEDA LAL vs. AIJAZ HUSSAIN.

38 P.L.R. 946=164 I.C. 605=A.I.R. 1936 Lah. 1022.

Or. 22, rr. 3 & 4 and Or. 41—Suit for partition—Death of respondent—Legal representatives not brought in—Appeal if abates.

When a respondent in an appeal dies and it is impossible to proceed with the appeal in the absence of the legal representatives of the deceased respondents who are however not brought on the record, the appeal abates as a whole. This principle is applicable also to suits for partition and in such suits if the appeal has abated against one of the respondents and it is not possible to proceed with the appeal against the other respondents only, the entire appeal abates. (*King C. J. & Zia-ul-Hussain, J.*)

MAHAMMAD FARUQ vs. AZIZUL HASAN
11 Luck. 5.

Or. 22, rr. 3 & 9—Sole appellant dying leaving minor son—Court on being informed of the fact by an Advocate ordering substitution and appointing a guardian for the minor—propriety of the order.

During the pendency of an appeal, the sole appellant died, and the fact of his death and of his leaving behind two minor sons having been brought to the notice of the Court, by the Advocate of the deceased appellant, the Court passed an order substituting them in place of the deceased, and appointing the Deputy Registrar as their guardian. At the time of the hearing of the appeal objection having

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been taken to the substitution, held, that in the absence of an application under Or. 22, r. 3 (1) of the C. P. Code, by the legal representatives of the deceased sole appellant, it was not open to the Court to substitute them and direct that the appeal be proceeded with in their name. The interests of the minor could however be protected by an application in due time under Or. 22, r. 9 (2), C. P. Code for settling aside the abatement. (*Macpherson & Fazl Ali JJ.*)

HARIPADA GUPTA vs. LAL MAHTO & ORS.

17 P.L.T. 129=161 I.C. 592=A.I.R. 1936 Pat. 266.

Or. 22, rr. 3 & 10—Difference between the two rules.

There is a difference between rule 3 and rule 10 of Or. 22 of the C. P. Code. In case of death of a party to a suit, the Court on a proper application is bound to substitute the legal representative of the deceased party under r. 3 while r. 10 refers to cases of assignment, creation or devolution of an interest during the pendency of a suit other than on death, etc. In this case the Courts have a discretion to give leave for the suit to be continued by or against a person to or upon whom such interest has come or developed. (*Khawja Mohammed Noor & Saunders, JJ.*)

GOBORDHAN MUKHERJEE vs. SALIGRAM MARWARI & ORS.

15 Pat. 82=17 P.L.T. 73=189 I.C. 828=A.I.R. 1936 Pat. 123.

Or. 22, rr. 4 & 9—Abatement of suit—Right of the trial Court to set aside abatement or condone delay—Appellate Court when can interfere,

A Court after declaring that a suit has abated under r. 4 of Or. 22, C. P. Code, does not become functus officio but retains the right of setting aside the abatement if it is moved by an application under Or. 22, r. 9. Sub-rule 3 of r. 9 further empowers the Court to condone the delay under Sec. 5 of the Limitation Act. The discretion of the Court under this rule, if exercised, in favour of the party in default, is open to scrutiny and interference by the appellate Court only

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if the discretion has been exercised in a perverse or unjudicious manner and where this is not the case, the order once made, cannot be declared to be illegal merely because application to bring the legal representatives on the record was submitted beyond time. (*Addison & Din Mahammad, JJ.*)

ABDUL GHAFUR vs. MOHAMMAD HARUN.

A.I.R. 1935 Lah. 712=38 P.L.R. 194=160 I.C. 765.

Or. 22, rr. 4 & 11—Legal representatives of deceased defendant or respondent brought on record—death of one of them—suit or appeal, if abates as a whole.

Where on the death of a party in a suit or appeal, the right persons are brought on the record as his legal representatives, but one of them dies the effect is that the suit or appeal abates so far as he is concerned, but the estate continues to be sufficiently represented for the purposes of that litigation by the remaining legal representative or representatives. 98 I. C. 612 approved; 51 All. 267. 50 Bom. 802 & 49 Bom. 113 distinguished. (*Beasley C. J. & Stodart J.*)

MUTHURAMAN CHETTIAR vs. ADAI-KAPPA CHETTY.

59 Mad 660=1936 M.W.N. 125=43 M.L.W. 500=162 I.C. 214=A.I.R. 1936 Mad. 336.

Or. 22, rr. 4 & 11—Suit on basis of handnote—pendente-lite interest not granted—appeal for recovery of such interest—One of the respondents dying—Legal representative not brought on record—Appeal, if abates as a whole.

So far as a suit is concerned, it is true that where the liability of the defendants is joint and several it is open to the plaintiff, on the death of one of them, to proceed against the remaining defendants alone. Different considerations however arise in an appeal that there may be cases in which a suit might not have abated but an appeal will abate. The test to be applied is whether in the event of the appeal being allowed as against the remaining respondents there would not be contradictory decrees

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in the same litigation with respect to the same subject matter. (*Khawja Mohammad Noor & Varma, JJ.*)

APURBA KRISHNA MITRA vs. RAM BAHADUR.

A.I.R. 1936 Pat. 191=161 I.C. 862.

Or. 22, rr. 4 & 11—Appeal from a decree allowing claim but refusing to grant pendente lite interest—One of the respondents dying—Legal representatives not brought on record—Appeal, if abates as a whole.

A suit on a pronote was decreed by the trial court; but, interest pendente-lite not having been granted the plaintiff appealed for recovery of such interest. During the pendency of the appeal one of the respondents died and his legal representative was not brought on the record within the prescribed period. Held, that the appeal abated as a whole, because, if the appeal was allowed, there would be two inconsistent decrees on the basis of the same pronote. While against some of the defendants it will be a decree for principal and interest only up to the date of the suit and not for interest pendente-lite against the others, there may be another decree for the amount as well as for interest pendente-lite. (*Khawja Mohammad Noor & Varma JJ.*)

APURBA KRISHNA MITRA vs. RAM BAHADUR.

A.I.R. 1936 Pat. 191=161 I.C. 862.

Or. 22, rr. 4 & 11—Suit to obtain a declaration in respect of a building—Death of one of the decree-holders—Legal representative not brought on record—Appeal, if abates.

A certain property was attached in execution of two decrees held by two decree-holders. The judgment-debtor filed certain objections to the attachment and being unsuccessful instituted a suit under Or. 21, r. 63, C. P. Code to obtain a declaration in respect of the property. The suit having been dismissed the judgment debtor appealed citing both the decree-holders as respondents. During the pendency of the appeal one of the decree-holders died, and his legal repre-

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sentatives were not brought on the record for more than 3 months. *Held*, that the appeal abated but only partially. Separate attachments of the property in suit were separately obtained by the two decree-holders whose interests were therefore clearly separate and divisible. Therefore the fact that one of the decree-holders had now dropped out of the appeal did not take away the right of the appellant to challenge the decree as against the other decree-holders. (*Jailal & Sala JJ*)

DEWAN GHAND vs. PUNJAB & KASHMIR BANK LTD, RAWALPINDI.

38 P.L.R. 269.

Or. 22, r. 4. & Or. 23, r. 1—Non-substitution within limitation of some known legal representatives of deceased defendant in ejectment suit order passed thereafter permitting withdrawal of suit with liberty to bring fresh one, if valid—such order, if may be questioned in second suit against all representatives.

When on the death of the defendant in a suit for possession, some of his legal representatives whose existence is known to the plaintiff are not brought on the record in time through others are, the suit abates and an order made thereafter permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit is without jurisdiction. The validity of such an order can be questioned in a second suit brought on the strength thereof against all the legal representatives and such suit is not maintainable. (*R. C. Mittra J.*)

RAMESH CHANDRA MAJUMDAR vs. DUD MEHAR BIBI.

40 C.W.N. 1019.

Or. 22, r. 5—Order passed under the rule, if operates as resjudicata.

Or. 22, r. 5, C. P. Code, provides a summary procedure for appointing a person to be a legal representative of the deceased party for the purpose of prosecuting the suit, and the order appointing the legal representative does not operate as a final determination of the representative character of the person appointed, that is to say,

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it, does not operate as *resjudicata*. 28 All. 109 followed; 48 All. 422 not followed. (*Harris & Rakhpal Singh JJ.*)

ANTU RAI & ORS. vs. RAM KINKAR RAY & ANR

1936 A.L.J. 622 = A.I.R. 1936 All. 412 = 1936 A.W.R. 597 = 163 I.C. 283.

Or. 22, r. 6—Local inspection by Court during interval of last date of hearing and date of judgment—Suit, if can be regarded to have concluded on last date of hearing.

After the last date of hearing of a suit and before judgment was pronounced, the Court made a local inspection of the site in suit and made a reference to it in its judgment. *Held*, that the hearing of the suit could not be said to have concluded on that date of hearing within the meaning of Or. 22, r. 6, C. P. Code. (*Agha Haidar J.*)

KEHR SINGH vs. CHANDA SINGH,

A.I.R. 1936 Lah. 578 = 164 I.C. 971.

Or. 22, r. 92, r. 10 (1)—Death of appellant—widow continuing appeal on behalf of minor son—death of widow—guardian not appointed—procedure.

Where on the death of the appellant during the pendency of an appeal, his widow and minor son under her guardianship were substituted, and subsequently the widow also, died, and no steps were taken to carry on the litigation, *held*, that it was the duty of the respondent to take steps in the matter, failing which, further proceedings were to be stayed till the minor attained majority and elected whether he would proceed with the appeal or not. (*Das & Adami, JJ.*)

RAMJI DAS vs. MAHAMAYA PRISAD SINGH,

17 P.L.T. 86.

Or. 22 r. 10—Devolution of interest pending suit—application for substitution by the successor in interest of the original plaintiff—right of original plaintiff to continue suit, if substitution not allowed.

Or. 22, r. 10, C. P. Code, no doubt gives a discretion to the Court to allow or refuse

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an application for substitution, by the party on whom the interest of the plaintiff who instituted the litigation has devolved. But this discretion should be reasonably exercised and leave should not be withheld without adequate reason. Where however, leave has not been granted, the plaintiff who instituted the litigation may prosecute it to its conclusion and in such case, the litigation will continue in his name for the benefit of his successor-in-interest. (*Agarwala & Rowland JJ.*)

JYOTI LAL SHA & ORS. vs. SHEODHAYAN PRASAD SHA & ORS.

17 P.L.T. 564 = 15 Pat. 607 = 163 I.C. 998 = A.I.R. 1936 Pat. 220.

Or. 22, r. 10—Object and scope of the rule.

It is clear from the language used in Or. 22, r. 10, C. P. Code that this provision is merely an enabling one, and no penalty can be inflicted under the rule for failure to substitute the person upon whom the interest of the plaintiff or a defendant devolves while a suit is pending. The rule merely provides that should the interest of the plaintiff devolve upon another person by assignment or otherwise while the litigation is still pending, such other person may obtain the permission of the Court to continue the litigation as if he were the plaintiff in the suit. (*Fazl Ali & Luby JJ.*)

HARIHAR GIR vs. KARU LAL.

15 Pat. 64 = 17 P.L.T. 83.

Or. 22, r. 10—Legal representative of deceased party transferring his interest to other man—such person, if may be permitted to continue suit.

Or. 22, r. 10, C. P. Code does not apply to a case in which the legal representative of a deceased party not already on the record, instead of going forward and himself taking responsibility of the suit, transfers his interest to another man. Such person cannot be permitted to continue the suit. R. 10 applies only to cases in which there has been assignment by a party who is already on the record. 87 I. C. 102

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followed; 4 P. L. T. 1 distinguished. (*Khawja Mahammed Noor & Saunders, JJ.*)

GOBORDHAN MUKHERJEE vs. SAILGRAM MARWARI.

15 Pat. 82 = 17 P.L.T. 73 = 159 I.C. 828 = A.I.R. 1936 Pat. 123.

Or. 22, r. 10—Assignment *puerile* lite—Deed of relinquishment, if constitutes assignment, creation or devolution within r. 10

Where an assignment under a sale deed is made during the pendency of a suit and subsequently the assignee executes a deed of relinquishment in favour of another person, declaring the latter as the real purchaser under the original sale deed and relinquishing his rights, if any, to the latter, the deed of relinquishment does not continue any assignment, creation or devolution of an interest within the meaning of Or. 22, r. 10 C. P. Code. (*Srivastava & Nanavutty, JJ.*)

KEOLAPATI vs. AMAR KRISHNA NARAIN SINGH.

1936 O.W.N. 183 = 160 I.C. 801 = A.I.R. 1936 Oudh 224.

Or. 22 r. 10—Assignment *pendente lite*—assignee impleaded in suit—Application by another person for the substitution of the assignee in appeal, if lies.

Where an assignment under a sale deed has been made during the pendency of a suit in the trial court, and the assignee is added as co-plaintiff in the suit, an application based on the original sale deed by another person for substitution of his name in place of the assignee as co-appellant in appeal is not maintainable under Or. 22, r. 10, C. P. Code. (*Srivastava & Nanavutty, JJ.*)

KEOLAPATI vs. AMAR KRISHNA NARAIN SINGH.

1936 O.W.N. 183 = 160 I.C. 801 = A.I.R. 1936 Oudh 224.

Or. 22, r. 10—Application for leave to be brought on record by a transferee of rights—Court, if can refuse leave on the ground of delay and laches.

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By the use of the word 'may' in Or. 22, r. 10(1) C. P. Code, full discretion is given to the Court to allow an application to be brought on the record made by a party to whom the rights of the plaintiff have been transferred. Such discretion must be judicially exercised. Where the applicant has been guilty of undue delay and laches, the Court can refuse to exercise his discretion in favour of the applicant. (*Beasely C. J. & Gentle J.*)

RAGHUNATH DASS HARANBAND vs. PURUSHOTTAM DAS.

71 M.L.J. 307=164 I.C. 845=1936 M.W.N. 771=44 M.L.W. 263=A.I.R. 1936 Mad. 714.

Or 23, r. 1—Leave to withdraw, at what stage may be granted.

The High Court may, on appeal from a remand order, give permission to the plaintiff to withdraw his suit with liberty to bring a fresh one. (*Addison A. C. J. & Din Mohammed J.*)

MOHAMMAD MURID vs. MOHAMMAD BUTA RAHAMMATULLAH.

38 P.L.R. 319.

Or. 23, r. 1—Plaintiff withdrawing suit on pronote—suit dismissed—no permission to bring fresh suit granted—subsequent suit on another pronote for same consideration as original note and in respect of same subject matter—suit, if barred.

Where a suit on a pronote is withdrawn by the plaintiff without permission to bring a fresh suit, and is thereupon dismissed, a subsequent suit on another pronote executed for the same consideration and in respect of the same subject matter as the original one is not maintainable. (*Srivastava & Nanavutty J.*)

IQBAL BAHADUR NIGAM & ORS. vs. DOORGA PRASAD NIGAM.

11 Luck. 360.

Or. 23, r. 3—Compromise when can be said to be lawful.

It is not permissible to a Court to record a compromise where one of the

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interested parties has not consented to it. A compromise cannot be said to be lawful unless all the parties interested have accepted the same. (*Bhide J.*)

CHANDRA RAM vs. HARICHAND.

38 P.L.R. 263.

Or. 23, r. 3—Compromise—Recording of compromise, if may be postponed.

A Court to whom a petition of compromise is presented should not delay passing an order for recording the compromise. Under Or. 23, r. 3, C. P. Code, the Court is required to pass an order directing the compromise to be recorded, and this should be done at once. The Court has also to pass a decree in accordance with the compromise so far as it relates to the suit, and the passing of the decree may, if necessary, be postponed till hearing of the suit, if there is a question as to how the interests of other parties to the suit who have not entered into the compromise would be affected by it; but this is no reason for deferring the actual recording of the agreement or compromise. (*Mohammed Noor & Rawland JJ.*)

THAKUR PRASAD SINGH vs. BARUI HAR PEARY KUEA.

15 Pat. 456=A.I.R. 1936 Pat. 401=163 675.

Or. 23, r. 3—Compromise—Court, if can refuse to record compromise on the ground that the compromise was voidable.

A compromise cannot be attacked in proceedings under Or. 23 C. P. Code by allegations that it is a voidable compromise brought about by fraud, undue influence or duress. Provided the compromise is lawful, that is to say, not contrary to law, the Court is obliged to record it unless there are special circumstances arising through one of the parties being under a disability. The mere fact that it may be voidable is no reason for a Court refusing to record it and though it is true that the Court has a duty to go into any question of fact on which the parties may not be agreed it has no duty to go behind a

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compromise upon which the parties have agreed. (*Wadsworth J.*)

NAMBURI SURAPARAJU vs. NULU VENKATARATHNAM.

70 M.L.J. 471=43 M.L.W. 386=1936
M.W.N. 199=A.I.R. 1936 Mad. 347=
161 I.C. 728.

Or. 23, r. 3 & O. 42, I r. (n) —
Award by private arbitrator without consent of Court—Court passing an order that there is no adjustment—order, if appealable.

Where the Court after deciding the issue as to the validity of the award made by a private arbitrator remarks that there is no adjustment of claim in the suit out of Court as alleged, it amounts to an order refusing to record an adjustment under Or. 23 r. 3 C.P. Code, and the order is appealable under Or. 43, r. I (n) of the Code. (*Pollock, A.C.J.*)

TATVARAO vs. SHRIKRISHNA LUXMINARAIN.

38 N.L.R. (Supp.) 72=160 I.C. 202=
A.I.R. 1936 Nag. 8.

Or. 25 r. 1—Discretion under the rule, if unqualified.

The discretion indicated by the word 'may' in Or. 25, r. I. C.P. Code is an unlettered and unqualified discretion. (*Cunliffe, J.*)

CALICO PRINTERS ASSOCIATION LTD. vs. JEEVANRAM GANGARAM & CO.

63 Cal. 897=40 C.W.N. 511=164 I.C. 560.

Or. 25, r. I (3)—One of several plaintiffs a woman—Security for costs, if can be demanded.

Or. 25, r. I (3) C.P. Code, has no application to a suit where only one of several plaintiffs is a woman, and therefore no security for costs can be demanded in such a case. (*Ponckridge J.*)

VICTOR DAY vs. NISSIM ASRON JUDAH.

63 Cal. 809.

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Or. 26, r. 10—Commissioner appointed to determine location of plot by reference to lease and settlement map—Evidence of possession recorded by him, if admissible as evidence in suit.

When a Commissioner is appointed for ascertaining whether the suit land is within plaintiff's lease and for relaying the settlement map in order to determine under what plot it falls, evidence of possession recorded by him is admissible as evidence in the suit. (*Jack J.*)

TARAKNATH BANERJEE vs. KARUNAMOY MUKHERJEE.

40 C.W.N. 532.

Or. 26, r. 10—Commissioner for local investigation whose work found inaccurate if disentitled to fees in the absence of negligence, incompetence or dishonesty.

Where a pleader commissioner had to relay a large number of days of an old chitta from inadequate materials and the Court found that the relaying was not quite accurate, but there was no finding of incompetence or carelessness or negligence or improper motive, held, that the commissioner's fees could not be rightly disallowed. (*R. C. Mitter J.*)

DEBENDRA KUMAR SEN vs. SUBAL CH. CHOWDHURY & ORS.

40 C.W.N. 923.

Or. 26, r. 15—Facts to be considered in awarding costs of commission.

In order to determine what amount a party applying for commission should be directed to pay under Or. 26, r. 15, C.P. Code, the Court has to take into consideration not only the labour expended by the Commissioner but also the return which the applicant has got for his money; the Court has also to consider whether the work has been done efficiently and with due diligence in accordance with the directions of the Court. (*Nasim Ali & Edgley J.*)

NADIA BASHI DEB CHOWDHURY vs. SUDHA BAKUL DEY & ORS.

40 C.W.N. 1216=63 C.L.J. 563.

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Or. 30, r. 1—*Suit in firm name by one partner, other partner refusing to sue, whether maintainable—Such other partners whether necessary parties—Right of such partners to ask indemnity against costs from the suing partners.*

One partner of a firm can bring a suit in the firm name under 30, r. 1 of the C. P. Code, even when the other partners refuse to sue. To such a suit, the objecting partners are not necessary parties. Such partners as refuse to sue are entitled to ask for indemnity against costs from the suing partners. (*M. C. Ghose & R. C. Mitra JJ.*)

BHADRESWAR COAL SUPPLY CO. vs. SATISH CHANDRA NANDY & CO.

40 C.W.N. 24=A.I.R. 1936 Cal 353=
163 I.C. 390.

Or. 30, r. 1—*Plaintiff describing himself as firm, M. L. R. G., through B. L. proprietor of the said firm—Plaint signed by B. L.—Plaintiff, if can be deemed to be suing in firm's name.*

The plaintiff in a suit described himself as the firm M. L. R. G. situated in town B etc. through B. L. proprietor of the said firm. The plaint was signed by B. L. Held, that the plaintiff was suing not in the firm's name, but in his own name and the mere fact of the firm name being mentioned, in no way affected the matter. What is contemplated in Or. 30, r. 1, C. P. Code, is that two or more persons under a firm may sue without mentioning the names of the individuals. (*Wort & Rowland JJ.*)

MOHAN LAL RAMGOPAL FIRM vs. UDAY RAM SHEWARAM & ORS.

A.I.R. 1936 Pat. 140=161 I.C. 516.

Or. 30, r. 9—*Suit by firm against partner, if maintainable*

It is true that the C. P. Code, does not profess to lay down substantive law, but Or. 30, r. 9, of the Code implies that a suit by a firm against one of its partners or between firms having common partners is maintainable in certain circumstances. To safeguard the interest of the defendant who may urge that after settlement of the entire account of the partnership, some

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balances may be found to be due to him, Or. 30, r. 9 provides that execution will not be taken without the leave of the Court and the Court may order all accounts to be taken and give such directions as it considers just. (*Bhide J.*)

CHAUDRI FAZAL DIN, GULAM QADIR, AHMED BAKSH & CO. vs GHULAM RASUL.

38 P.L.R. 857=A.I.R. 1936 Lah. 648
164 I.C. 832.

Or. 32, r. 3—*Duty of Court to appoint guardian-ad-litem of minor defendant on opposite party.*

It is the duty of the Court under Or. 32, r. 3, C. P. Code, to appoint a guardian-ad-litem of a minor opposite party or defendant. (*R. C. Mitter J.*)

MUKTI DEVI vs. MANORAMA DEVI.

40 C.W.N. 1211=63 C.L.J. 586=A.I.R.
1936 Cal. 490.

Or. 32, r. 3—*Appointment of guardians-ad-litem of minors irregular Guardians not putting forward substantial defence open to minors—Decree passed in suit, if can bind the minors.*

Certain persons who had been appointed guardians-ad-litem of minors in a suit failed to put forward while representing the minors a substantial defence which was available to the minors and ought to have been raised on their behalf. Held, that the decree passed in the suit was not binding on the minors although the guardians-ad litem might have substantially represented the minors in that suit. Under the circumstances, a suit by the minors for a declaration that the decree was not binding on them, was maintainable. 32 C. W. N. 665 & 8 Pat. 558 followed. (*Dunkley J.*)

MARY ALVERAZ vs. RATANAPON SOCIETY.

A.I.R. 1936 Rang. 237=163 I.C. 499.

Or. 32, rr. 3 & 4—*Mortgage suit against two persons and their minor children—Appointment of joint guardians for the minors—Interest of guardians adverse to those of minors—Appointment, if valid.*

There is nothing in the Criminal Procedure Code permitting the appointment of

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joint guardians-ad-litem. Therefore, where in a suit against 2 persons and their minor children, the Court without issuing any notice to the minors or other persons who might be fitted to act as guardians of the minors, and without taking any steps to comply with the provisions of Or. 39, rr. 3 & 4, passed an order appointing the two persons as guardians-ad-litem jointly for the same minors, and it appeared that the interests of the guardians-ad-litem so appointed were adverse to those of the minors, held, that the appointment of the guardians-ad-litem was defective. (*Dunkley J.*)

MARY ALVERAZ vs. RATANAPON SOCIETY.

A.I.R. 1936 Rang. 237 = 163 I.C. 499.

Or. 32, r. 7—Guardian of minor if can record satisfaction of a decree, without consent of minor.

Whether or not, r. 7, of Or. 32, is applicable in its terms to agreements in execution proceedings, the principle embodied in that rule is certainly applicable. Accordingly, after a decree has been passed in favour of a minor it is not open to his guardian or next friend to record satisfaction of the decree or enter into an agreement on his behalf without taking the permission of the Court. (*Varma & Rowland JJ.*)

LAL BABU vs. RANG BAHADUR SINGH.

17 P.L.T. 747 = A. J. R. 1936 Pat. 506 = 165 I.C. 857.

Or. 32, r. 7—Compromise by guardian without sanction of Court—validity.

Where a suit on behalf of a minor has been referred to arbitration and in the course of the arbitration proceedings a compromise was arrived at and agreed to by the guardian on behalf of the minor and an award was passed in the terms of the compromise, held, that the award could not be subsequently assigned on the ground that at the time the compromise was approved by the arbitrators, it had not received the sanction of the Court (*Madhavji Nair J.*)

SUBRAMANIA PILLAI vs. BIRVAPERU-MAL PILLAI.

59 M.d. 119.

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Or. 32, r. 7—Compromise by guardian adlitem without sanction of the Court, if binding on the minor.

A compromise arrived at by a guardian adlitem and next friend without obtaining leave of the Court as directed by the provisions of Or. 32, r. 7, C. P. Code, is not only voidable but is void altogether as against the minor and consequently the decree passed thereon is also void. 2 Lah. 164 dissented from. (*Rachpal Singh J.*)

MAHTAB SINGH & ORS. vs. DURGA NARAIN SINGH & ANR.

1936 A.W.R. 1017 = A.I.R. 1936 All. 811 = 1936 A.L.J. 1306.

Or. 32, r. 7—Compromise made on behalf of a minor—Court if can refuse to sanction it on the ground of its being injurious to the interest of the minor.

The jurisdiction of Equity Courts over the interests of minor has always been considered parental and of very solemn obligation, and a judge has to exercise that jurisdiction with care and due discretion. No contract or consent order amounting to an apparent surrender or variation of an infant's rights ought to be sanctioned or listened to for one moment by any Court without requiring some material calculated to satisfy its mind, and without being satisfied as far as it can be, on materials which are necessarily imperfect that the proposed arrangement is bonafide intended for the benefit of the infant. (*Nanavutty & Zia-Ul-Hasan, JJ.*)

HARDEQ BAKSH SINGH vs. BHARATH SINGH.

11 Luck. 30.

Or. 32, r. 2—Next friend of minor agreeing to relinquish claim on special oath by opposite party—Interests of next friend and of minor identical—sanction of Court, if necessary.

If the next friend of a minor expresses his willingness to relinquish the claim of the minor if the opposite party takes a certain oath, it is only a special method of proof adopted by the next friend and is not at all in the nature of a compromise. If the

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interests of the next friend are indetical with the minor, then it is not necessary to obtain the sanction of the Court under Or. 32, r. 7, C. P. Code, for adopting special oath as a form of proof. 49 All. 142 followed (*Agha Haidor J.*)

SULTAN MAHAMED vs. MEHEH KHAN.
A.I.R. 1832 Lah. 235=162 I.C. 921=
38 P.L.R. 629.

Or. 32, r. 7 (1)—Guardian of minor agreeing to reference to arbitration without obtaining sanction of Court—Agreement, if valid.

The word "agreement" in Or. 32, r. 7(1) C. P. Code does not refer to an agreement for reference to arbitration. Accordingly, it is not necessary for the guardian of a minor party to obtain the express leave of the Court before agreeing to a reference to arbitration being made by the Court. (*Allsop & Ganganath JJ.*)

HANUMAN SINGH vs. RAM LAKHAN SINGH & ORS.

1936A.W.R. 150=1936 A.L.J. 53=
A.I.R. 1936 All. 740=160 I.C. 868.

Or. 32, r. 15—Suit by a person on behalf of lunatic when competent.

In order that a suit by a lunatic can be instituted in his name by his next friend, the lunatic must be a person who has been adjudicated to be of unsound mind or a person who though not so adjudged is found by the Court on enquiry, by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interest when suing. Unless one of those condition is fulfilled a suit by a person posing himself as the next friend of the lunatic and on his behalf, is not competent. (*Mya Bu J.*)

MAUNG KYA YAN & ANR. vs. MAUNG THA E.

A.I.R. 1936 Rang. 121=161 I.C. 665.

Or. 32, r. 15—Cross appeals—lunatic appellant in one case and respondent in the other no body acting as his next friend or guardian—decree in appeal, if a nullity.

Where two cross appeals are filed and the appellant in one case step the same

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person as respondent in the other, is a lunatic, but nobody acts as his next friend or guardian, the decrees passed in appeal are not nullity, and if the decrees are in favour of the lunatic and he has in no way been prejudiced by the irregularity, the decrees cannot be avoided at the instance of the other party. (*Sulaiman C. J. & Bajpai J.*)

KANHAI LAL vs. THOMAS SKINNERVA.

1936 A.W.R. 832=1936 A.L.J. 964=
A.I.R. 1936 All. 836.

Or. 33, r. 1—Suit for partition—plaintiff unable to pay additional court-fee required by Court—Concession under the order, if can be granted.

There being considerable divergence of judicial opinion as to the court-fee payable in respect of partition suits, where after a suit has been filed the Court considers an additional fee necessary, but the plaintiff is not possessed of means to pay the additional fee, there is nothing inconsistent with the scheme of the Code in giving the plaintiffs the benefit of the provisions of O. 33, 2 Cal. 130, 8 Bom. 615 & 57 M. L. J. 677 followed; 36 C. W. N. 567 doubted. (*Varadachariar, J.*)

NEELI KANDI vs. KUN HAYISSA.

44 M.L.W 380=A.I.R. 1936 Mad. 158
=161 I.C. 359=1936 M.W.N. 137.

Or. 33, r. 1—Application for leave to sue in forma pauper is, in a suit for which court fee provided—court, if entitled to enquire into assets of the applicant.

An application for suing in forma pauperis was made in a suit for which a court fee of Rs. 125 was payable. The Subordinate Judge dismissed the application holding that the applicant could afford to pay the court fees and her assets were worth more than Rs. 100. Held, that as a court fee had been prescribed by law for the plaint in the suit, the Subordinate Judge had no jurisdiction to enquire into the assets of applicant. All that he was entitled to do was to enquire whether the applicant had sufficient means to enable him to pay

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the fees prescribed by law. (Srivastava & Nanaputty JJ.)

SABIKA KHATUN vs ANWARUL HASSAN.
1936 O.W.N. 237.

Or. 33, r. 1, 4 & 7(3)—Application to continue in form a pauperis suit commenced in ordinary form, if maintainable—such application, if can be entertained when made after expiry of period fixed for payment of deficit court fees.

An application to continue in form a pauperis a suit commenced in the ordinary form is maintainable. When such an application is made within one of the periods allowed for the payment of deficit court-fees or even beyond it, but before the plaint is rejected, it is not obligatory upon the Court to reject the application, but the Court may entertain it and shape its proceedings accordingly. The mandatory provision of Or. 7, r. 11, C. P. Code, being intended for cases where no other complications intervene, the Court has inherent power to depart from the normal procedure in such cases. (Mukherji S. K. Ghosh JJ.)

HAFIZ MOHAMMAD FATEH NASIB vs. SARADINDU MUKHERJI.
40 C.W.N. 747 = 162 I.C. 689 = A.I.R. Cal. 223.

Or. 33 r. 3 (as amended by Rangoon High-Court)—Application for leave to sue in forma pauperis—Date on which petition verified not stated—Court, if can allow amendment for putting in date.

Under Or. 33, r. 3, C. P. Code, the Court has jurisdiction to allow an amendment of a petition for leave to sue in forma pauperis in order that it should be made to conform to the rules prescribed under the Code. Where, therefore, a petition for leave to sue in forma pauperis did not state the date on which the verification was signed but was otherwise in form, held, that the Court had jurisdiction to allow the petition to be amended by putting in the date upon which the petition was verified. 7 Rang. 359 Explained and not followed. (Page C J. & Ba U J.)

M. H. MASHIAH vs. BALTHAZAR & SON LTD.

14 Rang. 311 = A.I.R. 1936 Rang. 279 = 63 I.C. 812.

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Or. 33, r. 3—Application presented on behalf of the applicant by her husband—Power of attorney held by husband—Execution disputed—Application, if liable to be rejected on the ground of defective presentation

Where an application for permission to sue as a pauper was presented on behalf of the applicant by her husband who had in his possession at the time a special Power of Attorney alleged to have been executed by the applicant, and the execution is disputed, held, that in these circumstances, the Court was not justified in rejecting the application on the ground of defective presentation, and the proper course for the Court was to require proof of the execution of the Power of Attorney. (Allsop & Ganganath JJ.)

RAM KAILAS KUNWARI vs. ISWARI SARAN & ORS.

1936 A.L.J. 684 = A.I.R. 1936 All. 475
163 I.C. 754 = 1936 A.W.R. 497.

Or. 33, r. 5—"Cause of action," meaning of.

Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. (Mosely & Ba U JJ.)

MA PAW vs. TASUJUT.

A.I.R. 1936 Rang. 388 = 164 I.C. 556.

Or. 33, r. 5—Order rejecting leave to sue in "forma pauperis"—Court, if must grant time for payment of court-fee.

When an application to sue in forma pauperis is rejected, the Court should grant a reasonable time to the applicant to pay the requisite amount of court-fee. (Agha Haidar J.)

DHARAM DAS vs. PARBATI.

238 P.L.R. 79.

Or. 33, r. 5—Plaintiff whose application to sue in forma pauperis is rejected, entitled to time for paying court-fee.

When an application to sue in forma pauperis is rejected, the plaintiff is entitled to

C. P. Code—(Contd.)

get reasonable time for paying the requisite amount of court-fee, 38 P. L. R. 79 followed, (*Jai Lal J.*)

SULTAN SINGH vs. KANSHI RAM.

36 P.L.R. 429,

Or. 33, r. 5—Decree against person of unsound mind. Fact not brought to notice of the Court during the hearing of the appeal—Decree, if can be challenged as being a nullity.

Where during the pendency of an appeal one of the respondents became insane, but the fact was not brought to the notice of the Court and the appeal was heard on the merits and decree granted in favour of the appellant, held that the decree could not be challenged at the instance of the insane respondent merely on proof of his insanity, but fraud or prejudice to him required to be proved. (*Jailal J.*)

RAM CHAND vs. WASANDA RAM.

38 P.L.R. 321 = 161 I.C. 987.

Or. 33, r. 5(a)—Application for permission to sue as a pauper—Formal defects in the application—Application, if liable to be dismissed.

Where an application for leave to sue as a pauper contains formal defects and defective verification, and is rejected on this ground, the Court ought to give the applicant an opportunity to amend the application in such a way as to remove the defects, and ought not to reject it summarily. (*Allsop & Ganganath JJ.*)

RAM KAILASH KUNWARI vs. ISWARI SARAN.

1936 A.L.J. 634 = 163 I.C. 754 = 1936 A.W.R. 497 = A.I.R. 1936 All. 475.

Or. 33, rr. 5, 6 & 7—Application for pauperism—Court, if can go into merits of plaintiff's case.

There is nothing in the rules of the C. P. Code which entitles a Judge hearing an application for leave to sue in *forma pauperis*, to go into the merits of the plaintiff's case. What is meant by the expression "where his allegations did not show a cause of action" is, that the Court

C. P. Code—(Cont'd.)

should consider, if the allegations contained in the application, if believed, show a cause of action, 3 Pat. 275 relied on (*Wort J.*)

BALBHADRA MISSIR vs. NARVADA PROSAD.

A.I.R. 1936 Pat. 2 = 160 I.C. 351.

Or. 33, r. 9(c)—Plaintiff suing as a pauper, if can be dispaupered for having mortgaged the property during the pendency of the suit.

The effect of Or. 33, r. 9 (c) C. P. Code, is that a person cannot sue as a pauper, if at the time of the suit some other person has under an agreement an interest in the subject matter. Therefore the execution of a mortgage, by a plaintiff given leave to sue in *forma pauperis*, of the properties affected by the suit, is a good ground for dispaupering the plaintiff. (*Mockett J.*)

VENGURI VEERARAGHAVA RAO vs. VENKATANARASINHA RAJA GARU & ORS.

59 Mad. 901 = 71 M.L.J. 355 = 43 M.L.W. 31 = 1936 M.W.N. 785 = A.I.R. 1936 Mad. 662 = 164 I.C. 831.

Or. 34, r. 1—Judgment-creditor who has a receiver appointed in execution, whether a necessary party in mortgage suit against judgment-debtor.

A judgment-creditor who has obtained an order for the appointment of a receiver of certain properties of the judgment-debtor in execution has no such interest in these properties as to make him a necessary party under Or. 34, r. 1, C. P. Code in a mortgage suit involving the same properties. The Court has no power to add such a person as a party to the mortgage suit. (*Panckridge J.*)

SIMBHURAM BERIWALA vs. GULZARI-LAOL THAKUR

40, C.W.N. 974, = 164 I.C. 1000

Or. 34, r. 3(b)—Money decree obtained by mortgagee in respect of money spent by him in payment of land revenue—mortgagee whether competent to sell the mortgaged property in execution of such decree.

C. P. Code—(Contd.)

A mortgagee paid revenue and land taxes in respect of the mortgaged property, and then instituted a suit for the recovery of the amount so spent by him. He obtained a decree and in execution thereof sought to sell the mortgaged property. *Held*, that Or. 34, r. (b) was no bar to the mortgagee bringing the mortgaged property to sale in execution of the decree obtained by him. (*Mackney J.*)

A. MURRAY vs. M. S. M. FIRM.

A.I.R. 1936 Rang. 47 = 161 I.C. 626.

Or. 34, r. 4—Subsequent mortgagee, if can apply for final decree or sale on satisfying prior mortgage.

A subsequent mortgagee by satisfying the prior mortgage can obtain the right to apply for a final decree. Para. 7, Form IX App. O of C. P. Code, gives the parties the right to apply to the Court from time to time as they may have occasion, and when applications are made, the Court should exercise a proper discretion and must interpret para. 7 as authorising it to pass suitable orders so as to safeguard the right of the subsequent mortgagee to obtain a final decree or to sell the property. (*King C. J. & Nanavutty, J.*)

NANDA LAL MANUCHA vs. AJODHYA BANK LTD., FAIZABAD.

1936 O.W.N. 139. 160 I.C. 165. = A.I.R. 1936 Oudh. 183.

Or. 34, r. 5—Provisions of Or. 34, r. 5 as amended by Act XXI of 1929, if applicable to pending cases.

It is well settled that the law of procedure governs all pending cases from the time it comes into force unless there is anything in the Amending Act to the contrary. The provisions of Or. 34, r. 4, C. P. Code as amended by Act XXI of 1929 are therefore applicable to all cases pending at the date of the amendment. (*Addison & Abdul Rashid JJ.*)

SURAJ BHAN vs. ALLAHABAD BANK, DELHI.

38 P.L.R. 259 = 164 I.C. 52 = A.I.R. 1936 Lah. 562.

C. P. Code—(Contd.)

Or. 34, r. 5—Auction-purchaser if a necessary party in proceedings under the rule.

In proceeding under Or. 34, r. 5, C. P. Code, whether in the original Court or in appeal, the auction-purchaser is not a necessary party. (*Addison & Abdul Rashid JJ.*)

SURAJ BHAN vs. ALLAHABAD BANK, DELHI.

38 P.L.R. 259 = 164 I.C. 53 A.I.R. 1936 Lah. 562.

Or. 34, r. 5—Right of auction-purchaser to property not included in mortgage decree but fraudulently inserted in sale certificate.

It is clear from the provision of Or. 34, r. 5 C. P. Code that the property which can be sold in execution of a mortgage decree is the mortgaged property only and no other property. Therefore a person who buys a property in execution of a mortgage decree which was not included in the mortgage suit or decree but was fraudulently inserted in the sale certificate, can get no more property than that which was really included in the mortgage decree, 27 Bom 334, 10 Mad. 241, 41 M. L. J. 261 followed. (*Dunkley J.*)

S. R. M. M. C. T. M. FIRM vs. KO PO SIN.

A.I.R. 1936 Rang. 127 = 162 I.C. 383.

Or. 34, r. 5—Preliminary decree in mortgage suit passed in terms of compromise—final decree if can be refused on the ground that no final decree was required.

Where in a mortgage suit a preliminary decree for sale is passed in terms of a compromise between the parties, and the decree contemplates and provides for the passing of a final decree, it is not open to the Court to refuse to pass a final decree on the ground that the decree being based on a compromise, no final decree was required. 49 All 297 distinguished; 1331 A. L. J. 53 relied on. (*Srivastava & Nanavutty JJ.*)

BAIJMOHAN NARAIN KAUL vs. MST. MUJIB FATIMA.

1936 O.W.N. 59 = 160 I.C. 174 = A.I.R. 1936 Oudh. 173.

C. P. Code—(Contd.).

Or. 34, r. 5 & Sec. 47—Orders under the rule, if appealable.

The decision of an executing Court on an application under Or. 34, r. 5, C. P. Code falls within the purview of Sec. 47 of the Code, and is therefore appealable. (*Addison & Abdul Rashid JJ.*)

SURAJ BHAN & 2 ORS. vs. ALLAHABAD BANK. DELHI.

38 P.L.R. 259 = 161 I.C. 53 = A.I.R. 1936 Lah. 562.

Or. 34, r. 6—Interest, if can be recovered when personal remedy for principal time-barred.

Interest being essentially not an inherent right, but a right which is given by law, it cannot be held to accrue to a principal amount which is not legally recoverable. Therefore, when a claim for a personal decree for the principal is barred, the claim for interest cannot be decreed. (*Teekchand & Dalip Singh JJ.*)

DOST MOHAMMAD vs. MIRAJDIN.

38, P.L.R. 47 = 163 I.C. 100 = A.I.R. 1936 Lah. 387.

Or. 34, r. 6—Mortgage suit—personal decree if can be passed at the time of the passing of the preliminary decree.

There is nothing in Or. 34, C. P. Code, which debars a Court from determining the personal liability of the mortgagor at the time when the preliminary decree is passed in a mortgage suit. Or. 34, r. 6, C. P. Code gives the plaintiff a right to apply for a personal decree after the sale of the mortgaged property. But this need not be done in a case when a personal decree has already been passed at the time of the passing of the mortgage decree. (*Macpherson & Khaja Mohamed Noor JJ.*)

SHEO BALAK PRASAD AWASTHI vs. JUGAL KISHORE NARAIN & ORS.

15 Pat. 345 = 17 P.L.T. 540 = 165 I.C. 581 = A.I.R. 1936 Pat. 568.

Or. 34, r. 6—Personal money decree for costs if can be given after decree for mortgage money barred.

C. P. Code—(Contd.)

It is open to a Court to give a personal money decree for costs against a mortgagor in cases where the personal remedy of the mortgagee against the mortgagor for the mortgage money and interest thereon is time barred. (*Teekchand & Dalip Singh JJ.*)

DOST MOHAMMAD & ANR. vs. MIAN MIRAJDIN.

38 P.L.R. 74, 163 I.C. 100 = A.I.R. 1936 Lah. 387.

Or. 34, r. 6—Mortgagee by virtue of a compromise with a transferee from mortgagor releasing mortgaged property from liability—personal decree for balance due, if can be passed against original mortgagor.

Where a mortgagee in a suit brought by him against the mortgagor and a subsequent transferee from the latter, enters into a compromise with the subsequent transferee, and in lieu of certain amount of money releases the mortgaged property from all liability under the deed of mortgage, then there is no provision under which the mortgagee can proceed to recover the balance of the money due to him under the mortgage deed from the original mortgagor. 50 All. 321, 21 Mad. 476 referred to. (*Nanavutty & Smith JJ.*)

MST. BOOTA vs. GUR PRASAD.

1936 O.W.N 732 = 164 I.C. 817.

Or. 34, r. 6—Sale of mortgaged property by mortgagor—Part of sale-proceeds left with vendee to pay off mortgage debt—Mortgagee, if has a right to personal decree against vendee.

Where a mortgaged property is sold by the mortgagor and part of the sale price is left with the vendee to pay off the mortgage debt, the mortgagee, in case the amount in the hands of the vendee proving insufficient to satisfy the whole debt can claim a right to a personal decree against the vendee, because, the mortgagee is no party to the contract of sale between the vendee and the mortgagor. 39 I. A. 7, 26

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O.W.N. 771 & 39 Mad. 759 followed.
(*King C. J. & Zia-Ul-Hassan J.*)

WALIUDDIN AHMED & ORS. vs. RAM
RAKHAN SINGH & ANR.

1936 O.W.N. 483 = 162. I.C. 451 =
A.I.R. 1936 Oudh. 313.

Or. 34, r. 6—*Compromise in mortgage suit providing for a personal decree for balance due after sale of mortgaged property—Compromise silent as to mortgagee's right to obtain a personal decree—Mortgagee, if can claim right to a personal decree in terms of the compromise.*

A mortgage decree passed on the basis of a compromise provided that the mortgaged property was to be sold, and if after the sale any balance remained due, the decree-holder would be at liberty to apply for a personal decree under Or. 34, r. 6, C. P. Code. There was nothing in the compromise to show that the mortgagee had consented to forego his right to obtain a personal decree. *Held*, that the decree was not contrary to the terms of compromise but was in accordance with the intention of the parties and the decree-holder was entitled to a personal decree under Or. 34, r. 6, C. P. Code, against the mortgagor for the balance of the mortgage money. (*King C. J. & Zia-Ul-Hassan J.*)

DRIPAL SINGH vs. KALKA SINGH.

1936 O.W.N. 476 = A.I.R. 1936 Oudh
259 = 1621 I.C. 536.

Or. 34, r. 6 & Or. 38, r. 5—*Mortgage decree—Mortgagee recovering substantial amount by sale of a portion of mortgaged property—Remaining property not likely to satisfy whole debt due—Application for attachment of non-mortgaged property before sale of remainder of mortgaged property and before obtaining personal decree, if maintainable.*

A mortgagee decree-holder recovered a substantial part of the sum due by sale of a portion of the property mortgaged. The amount which he was likely to obtain upon the sale of the remaining property was insufficient to satisfy the whole of the debt due to him. *Held*, that under the circumstances he could even before proceeding with the

C. P. Code—(Contd.)

sale of the remainder of the mortgaged property make an application for attachment under Or. 38 r. 5, C. P. Code, of the non-mortgaged properties of the judgment-debtor before obtaining a personal decree against him. (*Harris & Bajpai, JJ.*)

SHYAM LALL vs. BAHAL RAI.

1936 A.W.R. 362 = 163. I.C. 336 = 1936
A.L.J. 314 = A.I.R. 1936 All 408

Or. 34, rr. 7 & 9—*Mortgage suit—Court if may decree surplus amount against mortgage in case of over-payment.*

Some of the heirs of a mortgagee brought a suit for the entire money due on a mortgage impleading as defendants the other heirs who did not join in the suit, and the court after considering the whole account passed a decree for a surplus amount in favour of the mortgagor's heirs against an heir of the mortgagee impleaded as defendant who had been overpaid. *Held*, that the decision of the Court had to be upheld even though the heirs of the mortgagor and an heir of the mortgagee were arrayed on the same side as defendants. (*Srivastava & Nanavutty JJ.*)

MAHAMMAD SADIK ALI KHAN vs. NIAZ
AHMED.

1936 O.W.N. 306 = 161 I.C. 385 =
A.I.R. 1936 Oudh 242.

Or. 34, r. 11—*Suit on basis of mortgage—Attaching creditor not impleaded—effect of.*

Where certain property subject to a mortgage is attached in execution of a simple money decree and subsequently the mortgagee brings a suit on the basis of the mortgage but does not implead the attaching creditor, the non-joinder of the attaching creditor assuming that he was a necessary party, does not entitle him to ignore the mortgage. The result of such a non-joinder cannot be fatal to the rights of the mortgagee, but the obvious result would be that the rights of persons who have not been joined would not in any way be affected either by the decree in the mortgage suit or even perhaps by the sale on the basis of the decree. (*Bajpai J.*)

GOPAL DEVI vs. LACHMI SHANKER.

A.I.R. 1936 All. 512 = 1936 A.W.R.
595 = 1936 A.L.J. 708.

C. P. Code—(Contd.)**Or. 34, r. 14—Scope and applicability.**

It is not open to a creditor who has obtained a simple money decree in satisfaction of a claim arising under the mortgage to put the mortgaged property itself to sale in execution of his decree as long as mortgage subsists. (*Harris & Bajpai JJ.*)

SHAIKAT ALI vs. SHEO GHULAM.

1936 A.W.R. 510=1936 A.L.J. 692=
A.I.R. 1936 All. 663=165 I.C. 124.

Or. 34, r. 14—Mortgagee leasing mortgaged property to mortgagor—decree for arrears of rent—mortgagee if can sell equity of redemption in execution.

Where a mortgagee leases the whole of the mortgaged property to the mortgagor and the kabuliya executed by the latter is in respect of the whole property mortgaged and subsequently the mortgagee obtains a decree for arrears of rent, he cannot proceed to sell the equity of redemption in execution of his decree by reason of the provisions of Or. 34, r. 14, C. P. Code, as the arrears of rent decree represent in substance the usufruct of the mortgaged property and the decree is a decree for the payment of money in satisfaction of a claim arising under the mortgage. 41 All. 399 relied on. (*Harries J.*)

PIAYARE LAL vs. HASAN AHMED.

A.I.R. 1936 All. 708=1936 A.W.R.
713 162 I.C. 402=1936 A.L.J. 1218.

Or. 34, r. 14—Instalment decree—judgment-debtor hypothecating property for payment of instalment—if property saleable in execution of decree on default of instalment.

When a property is given in security for the satisfaction of a simple money decree, the decretal debt thereby becomes a charge on the property, and the charge, can be enforced in execution of the decree itself. It is not necessary to have recourse to a fresh suit. (*Mohammed Noor & Varma JJ.*)

NOROTAM DAS vs. KRISHNA PRASAD.

15. Pat. 545=A.I.R. 1936 Pat. 289=
162 I.C. 830=17 P.L.T. 434.

Or. 37, rr. 2 & 3—Suit on promote—jewellery pledged as security for loan—plaintiff seeking leave under Or. 2, r. 2,

C. P. Code—(Contd.)

to reserve his right as pledgee—defendant applying for leave to defend—application, if to be granted.

In a suit on a promote instituted under the summary procedure prescribed by Or. 37 C. P. Code, the plaintiff stated in his plaint that he was pledgee in respect of certain articles of jewellery for payment of the money due in respect of the said notes and he asked for leave under Or. 2, r. 2, to reserve his rights as such pledgee. The defendant applied for leave to defend on the ground that since the execution of the promotes various sums of money had been paid in satisfaction of the amount due, and the amount claimed was much in excess of the amount actually due. Held that under the circumstances, leave to defend could be granted on the defendant giving securities for costs only. (*Mc Nair J.*)

SURPUT SINGH vs. MAHARAJ BAHADUR SINGH.

A.I.R. 1936 Cal. 476.

Or. 37, r. 3 (2)—Leave to defend when granted, if must be unconditional.

It is not reasonable interpretation of Or. 37, r. 3. (2), C. P. Code, to say that it contemplates only two courses: either to a grant of leave unconditionally or a refusal of leave. At the time when the question of granting of leave comes up, the Court has not before it the full materials on which it can come to a satisfactory conclusion on the merits of the proposed defence; and if it thinks that there is something to be said in defence, what can be described as a "plausible defence," it may be inclined to grant leave but only on condition of security. The condition of payment into Court or giving security is seldom imposed and only in cases where the defendant covenants or there is good ground in the evidence for believing that the defence set up is fair defence. But it is not possible to crystallise into rules of law the circumstances under which in the exercise of the discretion vested in the Court by the second clause of Or. 37, r. 3, the Court can demand security. (*Varadachariar J.*)

CHITTUPURI GOPALA RAO vs. PARACHURI SUBBA RAO.

70 M.L.J. 241=A.I.R. 1936 Mad. 246
=43. M.L.W. 298=1936 M.W.N. 175
=161 I.C. 182.

C. P. Code—(Contd.)

Or. 38, r. 5—Requirements for an order under the rule.

An order under Or. 38, r. 5, C. P. Code cannot be passed until the defendant has been called upon either to furnish security or to produce and place at the disposal of the Court the property concerned or to appear and show cause why he should not furnish such security. (*Harris & Bajdai JJ.*)

SHYAM LALL vs. BAHAL RAI.

1936 A.W.R. 362=1936 A.L.J. 314=
163 I.C. 336=A.I.R. 1936 All. 408.

Or. 38, r. 5 (1) Issue of notice under the rule, if absolutely necessary.

Before passing an order of attachment before judgment, the Court must faithfully and strictly carry out the stringent procedure as laid down in Or. 38, r. 5, C. P. Code. Under cl. 1 of r. 5, the issue of notice to defendant is absolutely necessary before an order under cl. 3 of the rule can be passed. Where no notice is issued, there is no foundation for an action under Or. 38, r. 5 (3), C. P. Code. (*Agha Haidar J.*)

MADAN THEATRES LTD. vs. HARI DAS.

38 P.L.R. 772=A.I.R. 1935 Lah. 33.

Or. 38, rr. 5 & 6—Application for attachment before judgment—duty of Court.

The provisions of Or. 38, rr. 5 & 6 are very drastic as the plaintiff can secure a great advantage over his opponent in the earlier stages of the litigation long before the merits of the controversy are tried out. The Court should therefore be fully satisfied on a proper affidavit or other materials, before it takes any action under the provision of the two rules. (*Agha Haidar J.*)

MADAN THEATRES LTD. vs. HARI DAS.

38. P.L.R. 772=A.I.R. 1936 Lah. 33.

Or. 39 r.—Application for injunction restraining sale, in appeal against judgment in another suit—injunction if may be granted.

Where a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdic-

C. P. Code—(Contd.)

tion whatever, merely because an appeal is pending in another suit, to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. (*Beasley C. J. Stodart J.*)

T. S. SANKARA AIYR MUHAMMAD GANI ROWTHAR.

59 Mad. 744=A.I.R. 1936 Mad. 762
=70 M.L.J. 257=1936 M.W.N. 51=
43. M.L.W. 383=161 I.C. 721.

Or. 3, rr. 1 & 2—Breach of injunction—penalty.

Or. 39, 2 (3), C. P. Code applies to disobedience generally of an injunction granted by the Court; and the words "in the case of disobedience" in that clause are wide enough to cover breaches of injunctions issued under Or. 39, r. 1, for which breach, no penalty is elsewhere provided. (*Macpherson & Mohammed Noor, J.*)

JANG BAHADUR SINGH vs. CHHABILA KOERI.

17 P.L.T. 61=15 Pat. 320=160 I.C.
347=A.I.R. 1936 Pat. 23.

Or. 40, r. 1—Appointment of Receiver Guiding principles.

The question whether a Receiver should be appointed or not cannot be decided on the rulings but according to the circumstances of each particular case. In order to succeed in getting a Receiver appointed the plaintiff must show that prima-facie he has title and the defendant has no title. Where the action of the plaintiff in applying under Or. 40, r. 1, C. P. Code is found not to be bonafide, the Court should not appoint a Receiver of the property in dispute. (*Thomas J.*)

ALI RAZA KHAN vs. NAWAZISH ALI KHAN.

1937 O.W.N. 456=1611 C. 838.

Or. 40, r. 1—Addointment of Receiver in mortgage suit.

In a mortgage suit when the interest is in arrears, the Court will normally appoint a receiver as of course whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and

C. P. Code—(Contd.)

whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost. The reason why the Court will appoint a receiver in such circumstances is that but for the delay that invariably and inevitably occurs on account of the procedure that must be followed before the sale of the property takes place, the mortgagee would have received the proceeds of the sale on the day upon which his suit or petition had been filed. The court treats that as done which should have been done, and on the application of the mortgagee in a proper case it will take possession of the property and the accruing rents and profits out of the hands of the mortgagor by appointing a receiver, and if the claim of the mortgagee ultimately succeeds will allocate to the mortgagee the rents and profits accruing from the property from the date when the receiver was appointed. (*Page C. J. & Bu U. J.*)

AGA G. ALLY RAMZAN YEZDI vs. MESSRS. BALTHAZAR & SON, LTD.

14 Rang. 292 = A.I.R. 1936 Rang. 290 = 163 I.C. 850

Or. 40, r. 1—*Defendant entitled to possession—Plaintiff not entitled to remove—Receiver, if can be appointed.*

Or. 40, r. 1(2). C. P. Code, is not limited to any person not party to the suit, but the language is wide and a Court is not competent, by appointment of a Receiver, to remove from the possession or custody of property any person whether a party to the suit or not, whom a party to the suit has not a right so to remove. A mortgagor under a simple mortgage is entitled to remain in possession of the property till it is actually sold in satisfaction of the mortgage decree. Accordingly, after the passing of the final decree for sale, a Receiver cannot be appointed of the mortgaged property so as to remove the mortgagor from possession of such property. 1933 A.L.J. overruled. (*Sulaiman, C. J., Thom & Rachpal Singh JJ.*)

RAM SWARUP vs. ANADI LAL.

1936 A.L.J. 605 = 1936 A.W.R. 565 = A.I.R. 1946. All 495 = 169 I.C. 481.

C. P. Code—(Contd.)

Or. 40, r. 1—Mortgage suit—Interest in arrears—Application for appointment of Receiver, if can be refused on the ground that security is sufficient.

The Court will appoint a Receiver in a mortgage suit at the instance of the mortgagee when the interest is in arrear. The mere fact that the property is more than sufficient to cover the mortgage debt is not a ground upon which the Court ought to refuse to appoint a Receiver in such a suit. 12 Rang. 437 relied on & 14 Rang. 16 distinguished. (*Page C. J., Ba U & Leach, JJ.*)

S. C. VENKENNA vs. M. C. MANGAM-MAL.

14 Rang. 308 = A.I.R. 1936 Rang. 296 = 163 I.C. 856.

Or. 40, r. 4 (2)—*Stay of execution on judgment-debtor furnishing security—application by decree-holder for appointment of a receiver, if can be entertained.*

Where a judgment-debtor has obtained from the Court an order for stay of execution on furnishing security and continues in possession of the property after furnishing the required security, the decree-holder can have no right to remove the judgment-debtor from possession, and an application by him for the appointment of Receiver for the purpose of realising the costs awarded to him is liable to be rejected as being tantamount to an application for removal of the judgment-debtor from the property. (*Nanavutty & Smith JJ.*)

SURAJ MOHAN DAYAL vs. SARUP NARAIN.

1936 O.W.N. 595 = 164 I. C. 159 = A. I. R. 1936 Oudh. 370.

Or. 40, r. 4—Receiver's account, passing of—Receiver if may be held liable and ordered to make good loss by wilful negligence at the time of passing accounts—Separate suit, if necessary.

A Receiver may be held liable and ordered to make good any loss sustained through his wilful negligence at the time of the passing of his accounts under r. 4 of Or. 20 of the C. P. Code; a separate suit for the purpose is not necessary 5 C. W. N.

C. P. Code—(Contd.)

223 & 53 Cal 881 distinguished. (*Jack & Henderson J.*)

SURES CHANDRA BANERJEE vs. A. K. M. ENAMEL HAQUE.

40 C.W.N. 479

Or. 41, r. 1—*Copy of translation of decree filed along with memorandum of appeal—Provision of the law, if complied with.*

The appellant filed along with the memorandum of appeal, copies of Urdu translation of the judgment & decree appealed from. *Held*, that there was no sufficient compliance with the provision of Or. 41, r. 1, C. P. Code, and the appeal was therefore liable to be dismissed. (*Agha Haidar J.*)

SURJAN SINGH vs. CHAMEL SINGH.

38 P.L.R. 288.

Or. 41, r. 1—*Appeal from final decree in partition suit limited to question of maintenance—copy of maps forming part of decree, if must be filed.*

Or. 41, r. 1, C. P. Code, in so far as it requires the memorandum of appeal to be accompanied by a copy of the decree appealed from is satisfied if a copy of only that part of the decree is filed against which the grounds taken are all directed. In any case, the Court has inherent power to dispense with a copy of that part of the decree which is unnecessary for the purposes of the appeal. Consequently an appeal from the final decree in a suit for partition in which the grounds are limited solely to the omission of any provision for maintenance, is in order although copies of maps forming part of the decree may not be filed. (*D. N. Mittra & S. K. Ghose, JJ.*)

SM. ANNABATI DASSI vs. PARAMESHWAR MALLIK.

49 C.W.N. 1298 = A.I.R. 1936 Cal. 151.

Or. 41, r. 1—*Claim decreed in part—appeal by both parties—appellate court dismissing appeal by plaintiff while allowing appeal by defendant—plaintiff, in second*

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C. P. Code—(Contd.)

appeal against dismissal of his appeal filing copy of decree of defendant's appeal in lower court—appeal, if properly presented.

The plaintiff sued for recovery of money advanced to the defendant and for damages for breach of a contract. His suit for recovery of money advanced was decreed but his claim for damages was dismissed. The plaintiff thereupon appealed against the dismissal of his claim for damages and the defendant appealed against the decree against him for recovery of the money advanced. The appellate Court dismissed the plaintiff's appeal and allowed the defendant's appeal, the result being a total dismissal of the plaintiff's claim. In second appeal the plaintiff filed along with his memorandum of appeal a copy of the decree passed by the lower appellate Court in the defendant's appeal and not of the decree passed in his appeal. *Held*, that there was no proper presentation of the appeal in as much as the plaintiff should have appealed against the decree dismissing his appeal under Or. 41, r. 1, C. P. C. to the lower Court and should have filed a (decree of that appeal. (*Agha Haidar J.*)

GIRDHARI LAL vs. RATAN CHAND.

A.I.R. 1936 Lah. 293 = 165 I.C. 137.

Or. 41, r. 4—*Suit for declaration of invalidity of defdt's election to Municipal Board, the Board being party—Common defence by defdts and Board—Suit decreed on common ground—One defendant, —if may appeal without joining Board as party.*

Where a suit is brought for setting aside the election of certain persons to a Municipal Board, joining the Municipal Board as a defendant, and such persons and the Board put forward the same defence and the suit is decreed against all the defendants on a common ground, one of such persons can maintain an appeal without making the Municipal Board a party. (*Guko & Bartley, JJ.*)

GOPESH CHANDRA ADITYA vs. RENODE LAL DAS.

40 C.W.N. 553 = 165 I.C. 606.2 = A.I.R. 1936 Cal. 424.

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Or. 41, r. 4.—*Some defendants entitled to appeal for themselves and others—one of them not joining in appeal, if bound by trial Court's decree.*

Where some defendants in a suit can file an appeal for their own benefit as well as for that of their co-defendants, the fact that one of them has not joined in the appeal does not make him bound by the Court's decree. (*Zia-Ul-Hasan J.*)

MOHUN SINGH vs. HIMMAN SINGH.

1938 O.W.N. 36=159 I.C. 778 = A.I.R. 1936 Oudh 147.

Or. 41, r. 6.—*Application by judgment-debtor for stay of sale of immovable property in execution of a decree against him—stay, if may be refused.*

Sub-rule (2) of Or. 41, r. 6, provides that when an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as the Court thinks fit until the appeal is disposed of. The Court can impose terms and even require the judgment-debtor to deposit the whole amount of the decree in Court in cash, but it cannot dismiss the application summarily. (*Saunders J.*)

BENI SINGH vs. RAM SARAN SINGH.

161 I.C. 938 = A.I.R. 1926 Pat. 443.

Or. 4, r. 10.—*Discretion by the Court in granting application for security for costs.*

No rule of practice can fetter the discretion of the Court in respect of applications for security for costs under Or. 41, r. 10, C. P. Code. A respondent is not entitled as of course to an order for security for costs merely because the appellant may through poverty be unable to pay the respondent's costs if the appeal fails. Each case turns on its own facts and it is not right or expedient to lay down any rule that would have the effect of regulating the discretion of the court as to the circumstances under which it should make an order for security. (*Page, C. J. & Ba U. J.*)

MIRJA SAGHIRUL HASSEN vs. RANGOON ELECTRIC TRAMWAY SUPPLIES CO. LTD.

14 Rang. 259 = A.I.R. 1936 Rang. 294 = 163 I.C. 973.

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Or. 41, r. 10 & Or. 43, r. 1.—*Order rejecting appeal for failure to furnish security, if appealable or open to revision.*

No appeal lies from an order rejecting an appeal under Or. 41, r. 10, C. P. Code for failure to furnish security because under Or. 41, the only orders that are appealable under Or. 43, r. 1 are all orders under rr. 19, 20 & 23. Nor is such an order open to revision by the High Court because the discretion of a court to ask for security is absolute, and the Court has an absolute power to pass an order given it by the Code. It is impossible to say that an order which it makes in this way is without jurisdiction. 25 Bom. L. R. 195 relied on. (*Baguley J.*)

A. V. R. R. M. CHETTIAR FIRM vs. S. P. I. N. CHETTIAR FIRM.

A.I.R. 1936 Rang. 109 = 161 I.C. 233.

Or. 41, r. 11.—*Summary dismissal of appeal, if proper where elaborate questions of fact involved.*

Where an application to appeal from a judgment of a Subordinate Judge was dismissed by the Dist. Judge summarily and it appeared from a perusal of the judgment of the trial Court that somewhat elaborate questions of fact had to be decided and also a question of law, though not quite so serious, held, that the case, under the circumstances, was one where an appellate judgment was called for and the District Judge should not have dismissed the appeal summarily. (*Wort A. C. J. & Dhavle J.*)

MAHABIR DAS vs. SADHO CHOWDHURI.

163 I.C. 142.

Or. 41, r. 11 & 12.—*Appeal if can be admitted in part—power of the Appellate Court to admit appeal on limited ground.*

There is no provision in the C. P. Code enabling the appellate Court to pass an order partly admitting and partly dismissing the appeal, and in the present state of the law it must be held that an appeal cannot be admitted on a limited ground as a whole. If at the time when the appeal is heard under Or. 41, r. 11, C. P. Code, the appellate Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are aban-

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done or if it is conceded on behalf of the appellant that the grounds other than those specified are not fit to be urged in appeal, there is nothing to prevent the Court before which the appeal is placed under Or. 41, r. 11, C. P. Code from making a note of the fact: 15 C. W. N. 921 & 43 Cal. 178 relied on. (*Fazl Ali & Luby JJ.*)

REKHA THAKUR vs. RAMNANDAN RAI.

15 Pat. 96—A.I.R. 1936 Pat. 7.

Or. 41, rr. 20, 33 & Sec. 151—*Suit for contribution dismissed against one defendant—in appeal his name not appearing in the memorandum—Court if competent to grant decree against him.*

In a suit for contribution the Court disallowed the claim of the plaintiff as against one of the defendants and dismissed the suit so far as that defendant was concerned. In an appeal preferred by the plaintiff this defendant was not mentioned in the memorandum of appeal, but the appellate Court granted a decree against him by applying the provisions of Order 41, Rules 20, 33 and Sec. 151, C. P. Code. *Held*, that no decree could be passed against the defendant by applying the provisions of Or. 41, Rules 20, 33 and Sec. 151, C. P. Code. (*Fazl Ali & Luby JJ.*)

BISAMBHARPO DEO NARAYAN SINGH & ORS. vs. HIT NARAIN SINGH.

15 Pat. 219=A.I.R. 1936 Pat. 49=
160 I.C. 976=16 Pat. L.T. 813.

Or 41, r. 21—Applicant introduced to a frequent visitor to High Court through a friend trusting on the said man with regard to his appeal—appeal heard ex parte—maintainability of rehearing application,

Where the respondent had approached one of his friends, familiar with Court work to look after his case, and that gentleman introduced him to another man who frequently visited the High Court, and the appeal was heard ex parte through the laches of the third party who took no steps, *held*, that there was no ground for rehearing of the appeal under Or. 41, r. 21, C. P. Code. 29 A. 338 referred to. 2 C. W.

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N. 414 & 39 Cal. 491 distinguished. (*Varma J.*)

RAGHUBIR MAHTO vs. GANESH DUTT OJHA.

159 I.C. 260=17P.L.T. 261=A.I.R. 1936 Pat. 128.

Or. 41, r. 22—Time for filing cross-objection.

Or. 41, r. 22, C. P. Code, lays down that a respondent may cross-object provided he does so "within one month from the date when he receives notice of the hearing of the appeal"—The use of the word "within" would fix two limits; (i) an anterior limit starting from the date of receipt of the notice, and (ii) a posterior limit of one month after that date. The cross-objections filed before that date would not be cross-objections at all in the strict legal sense of the word. (*Tekchand & Dalip Singh JJ.*)

M.T. KOSHALIA & ANR. vs. RIAZ-UDDIN & ORS.

A.I.R. 1936 Lah. 362=162 I.C. 336.

Or. 41, r. 27—Power of appellate Court to admit additional evidence.

The power given to a Court of appeal to admit additional evidence should be sparingly exercised, and the appellate Court should not, unless sufficient explanation is furnished, admit a document which was not produced in the trial court and where no attempt was made to produce the same in that court. (*Sripastava J.*)

ARJUN vs. THAKUR PRASAD.

1936 O.W.N. 722.

Or. 41, r. 27—Appellate Court, when can call for additional evidence.

Under Or. 41, r. 57 (1) (b), it is only where the appellate court "requires" it, that is, finds it needful, that an additional evidence can be admitted. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the record as it

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stands, some inherent lacuna or defect becomes apparent. (*Addison A. C. J. & Din Mohammad J.*)

GHULAM MOHAMMAD KHAN vs. SAMUNDAR KHAN.

A.I.R. 1936 Lah. 37 = 165 I.C. 626 = 38 P.L.R. 748.

Or. 41, r. 27—Power of appellate Court to admit documentary evidence.

Under Or. 41, r. 27, C. P. Code, the appellate Court has ample power to admit documentary evidence, when it finds that it is necessary to do so for the purpose of arriving at a decision in the suit. (*Agarwalla & Madan JJ.*)

CHHATRA KUMARI DEBI vs. MST. PARBATI KUER.

17 P.L.T. 709 = A.I.R. 1936 Pat. 600.

Or. 41, r. 27—Power of appellate Court to call a witness not called by the party in the trial Court.

There is nothing illegal in an appellate Court calling a witness not called by the parties in the trial Court where the appellate Court does so to elucidate a point involved in the decision of the appeal. The High Court will not in second appeal interfere with the discretion exercised by the lower appellate Court in calling the witness. (*Jai Lal J.*)

R SHAN LAL vs. CHARAN DAS.

38 P.L.R. 449.

Or. 41, r. 27—Report establishing final publication of Record-of-Rights referred to in order-sheet of Revenue Officer exhibited in trial court, received without objection—Finding on such evidence that Record finally published, if based on inadmissible evidence.

When the appellate court receives in evidence without objection a report establishing the final publication of the Record of Rights, such report being mentioned in the order sheet of the Revenue officer which was exhibited in the trial court, such reception is illegal by reason of Or. 41, r. 27 of the Code. Accordingly, a finding, based

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on such evidence, that the record was finally published cannot be said to be based on inadmissible evidence. (*Nasim Ali & Edgely JJ.*)

CHATTERJEE ESTATES LTD. vs. DHIRENDRA NATH ROY & ANR.

40 C.W.N. 521.

Or. 41, rr. 27 (2) & 29—Appeal—Additional evidence, when may be allowed.

The legitimate occasion for the exercise of discretion in allowing additional evidence to be produced, is, not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. When a court of appeal decides to admit additional evidence, it must record its reasons therefore as required by Or. 41, r. 27 (2), C. P. Code, or fulfil the requirements of Or. 41, r. 29. After following the correct procedure the Court should give the opposite party the fullest opportunity of rebutting the evidence by producing such evidence as they think relevant and proper. 10 Pat. 654 (P.C.) relied on. (*Agha Haider J.*)

SHADIRAM vs. MST. ATRI.

36 P.L.R. 511 = 162 I.C. 152 = A.I.R. 1936 Lah. 933.

Or. 41, r. 31—Four appeals involving different questions disposed of in one judgment—Parties not same—Judgment, if a proper one within the meaning of Or. 41, r. 31.

Where a judge disposes in a single judgment four appeals each involving a question quite distinct from the question raised in the others and the parties are also not the same, held, that under the circumstances no proper consideration can be given to the points for decision in the appeals and therefore in none of the appeals the judgment delivered can be regarded as a judgment within the meaning of Or. 41, r. 31, C. P. Code. (*Dunkley J.*)

S. P. L. A. CHETTIAR FIRM vs. MA PU.

A.I.R. 1936 Rang. 262 = 163 I.C. 624.

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Or. 41, r. 33—*Joint decree in favour of several persons—appeal against some of joint decree-holders,—appellate Court if can implead joint decree-holders as respondents in the appeal.*

If a joint decree were passed in favour of a number of persons and an appeal were preferred against only some of the joint decreeholders leaving out the rest and the period of limitation were to expire, then it would be too late for the lower appellate Court to implead such joint decreeholders, as respondents, in the appeal in order to consider the appeal against them and pass a decree against them. The cases where a decree is to be passed in favour of persons who have not appealed or who are to be impleaded for some other purpose stand on a different footing, for there is an express power conferred on appellate Courts by Or. 41, r. 33 to pass a decree in their favour. (*Sulaiman C. J. & Niamatullah J., Smith J. dissenting.*)

ABRAR HUSSAIN vs. AHMED RAZA & ORS.

1936 A.W.R. 1099.

Or. 43, r. 1(b)—“*Case open to appeal*,” meaning of—*Appeal not lying from decree under certain circumstances, but lying under some—Case, if open to appeal.*

The words “in a case open to appeal” in Or. 43, r. 1(d) of the C. P. Code have no reference to the appeal against the decree actually passed. A case is not open to appeal within the meaning of the sub-clause only when no appeal would lie in any circumstances from a decree that could be passed. (*R. C. Mitter, J.*)

MOHENDRA CH. DUTT ROY vs. BASIRUDDIN & ORS.

40 C.W.N. 992 = 63 C.L.J. 277 = A.I.R. 1936 Cal. 485.

Or. 43 r. 1(b)—*Ex parte decree in rent suit valued at Rs. 50 or less passed by Munsiff having final jurisdiction—Order refusing to set aside same by Munsiff having no final jurisdiction—Appeal if lies from such order.*

An appeal lies from an order under Or. 9, r. 13, C. P. Code rejecting an application

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for setting aside an ex parte decree in a simple suit rent valued at Rs. 50 or less passed by a Munsiff having no final jurisdiction, although from the decree actually passed no appeal might lie because of the trying Munsiff having final jurisdiction. 38 All. 297 & 55 M. L. J. 262 followed. (*R. C. Mitter J.*)

MOHENDRA CHANDRA DUTT ROY vs. BASIRUDDIN & ORS.

40 C.W.N. 992 = 63 C.L.J. 277 = A.I.R. 1936 Cal. 485.

Or. 43, r. 1(m)—*Order recording compromise, if appealable.*

Since Or. 43, r. 1(m), C. P. Code provides specifically for an appeal against an order recording a compromise without any restriction, such an appeal will lie, even though when there has been no dispute as to the factum of the compromise, the dismissal of the appeal would normally follow as a matter of course, there being no materials upon which the appellate Court can interfere. The right of appeal cannot be taken away on the plea that the Code cannot be read as giving what is in effect a right of appeal against a consent decree, against which no appeal lies with reference to the provisions of Sec. 96. (*Wadsworth J.*)

NAMBURI SURAPARAJU vs. NULU VENKATARATHNAM.

70 M.L.J. 471—43 M.L.W. 386 = 161 I.C. 728 = A.I.R. 1936 Mad. 347 = 1936 M.W.N. 199.

Or. 43 r. 1(m)—*Finding of trial Court that no compromise has been made and refusal to record it on that ground—Appeal, if lies.*

The words “refusal to record an agreement, compromise or satisfaction” in Or. 43, r. 1(m) are comprehensive and wide enough to cover the case in which the trial Court comes to a finding that no compromise agreement or satisfaction has been made and therefore refuses to record the same and pass a decree in accordance with it. Cl. (m) of r. 1 does provide for an appeal in a case in which the trial Court finds that no compromise has been made

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and refuses to record it on that ground.
(*Allison & Ganganath JJ.*)

GANGARAM SAHU vs. RAM SANKAR TEWARI.

1936 A.W.R. 408 = 163 I.C. 929 = 1936 A.L.J. 336 = A.I.R. 1936 All. 433

Or. 43, r. 1 (m)—*Compromise recorded without contest and decree passed—order recording compromise if appealable when compromise decree not appealed against.*

Or. 43, r. 1 (m), C. P. Code gives a right of appeal against an order recording a compromise without any restriction as to the nature of that order, whether passed after contest or without contest. An appeal therefore lies from an order recording a compromise, even where the compromise was recorded without any contest, and even where the order recording the compromise has ripened into a decree, and no appeal has been preferred against such decree. 57 Bom. 206 & 43 M. L. J. 290 not approved; 48 M. L. J. 249 followed. (*Wardsworth J.*)

SEETHAMRAJU RAMANARAYANA RAO vs. SEETHAMRAJU RAMAKRISHNA RAO.

70 M.L.J. 400 = 43 M.L.W. 722 = 1936 M.W.N. 86 = 163 I.C. 161 = A.I.R. 1936 Mad. 385.

Or. 43, r. 1(s)—*Order appointing Receiver ad interim, if appealable.*

The mere fact that the appointment of a Receiver is made ad-interim does not mean that the order is not an order under Or. 40, r. 1, C. P. Code. Therefore, such an order is appealable under Or. 43, r. 1 (s), C. P. Code, in the same manner as if the appointment had not been ad-interim, but final. (*Hilton J.*)

HARI KISHAN LAL vs. PEOPLES BANK OF NORTHERN INDIA LTD.

A.I.R. 19 6 All. 102.

Or. r. (w) 1 & Or. 47, r. 7—*Order granting application for review, if appealable.*

The provisions of Or. 43 r. 1 (w) must be read with the provisions of Or. 47, r. 7

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of the C. P. Code, with the result that no appeal can be entertained against an order granting an application for review except on one of the grounds mentioned in Or. 47, r. 7 (1) of the C. P. Code. (*Srivastava A. C. J. & Smith J.*)

GAJRAJ KURR vs. CHABRAJ KURR.

1936 O.W.N. 836 = 165 I.C. 19 = A.I.R. 1936 Oudh 409.

Or. 44, 4. 1—*Copy of decree and judgment, if must be filed with application for leave to appeal in "forma pauperis."*

The proviso to Or. 44, r. 1, C. P. Code, makes it incumbent upon the applicant to show to the Court that prima facie the decree appealed from was contrary to law, and this can only be done by means of reference to the decree and judgment on which it is founded. It is not for the Court to call for copies of the judgment and decree when it has to consider an application made to it for leave to appeal as a pauper. There can therefore be no valid application for leave to appeal before the Court without the presentation of the copies of decree and judgment. (*Cornish J.*)

RAJAMMAL vs. C. S. PARTHASARATHI AYYENGAR.

165 I.C. 471 = 1936 M.W.N. 804 = 44 M.L.W. 152 = A.I.R. 1936 Mad. 600.

Or. 44, r. 1, proviso—*Application for leave to appeal as pauper, can be rejected after issue of notices.*

An application for leave to appeal in forma pauperis under the proviso to Or. 44 r. 1, C. P. Code, cannot be rejected after notices have been issued to the Government Pleader and to the respondent. (*Zia-Ul-Hassan & Smith JJ.*)

ASA RAM vs. PUTTO LAL.

1936 O.W.N. 875 = 165 I.C. 276(1).

Or. 44, r. 1 Sec. 115—*High Court rejecting application for revision of an order refusing to grant leave to appeal as pauper, if can extend time for payment of Court-fee.*

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The High Court, while dismissing an application for revision of an order by the District Judge refusing to grant leave to the appellant to appeal in forma pauperis, can extend the time for payment of the requisite court fee even though the time fixed by the District Judge for paying the same has already expired and the appeal has been dismissed. (*Jai Lal J.*)

MST. RAM RAKHI vs. BAWA ISHAR DAS.

38 P.L.R. 374 = A.I.R. 1936 Lah. 909.

Or. 45, r. 15—Certified copies of Orders in Council, if may be upon.

The provisions of Or. 45, r. 15, C. P. Code are mandatory and Orders made in violation of such provisions are irregular and without jurisdiction. The Court should not act even upon certified copies of order in Council without the production of the original order in Council signed by the clerk of the Council. (*Srivastava & Nanavutty JJ.*)

BIRENDRA BIKRAM SINGH vs. BASDEO & ORS.

1936 O.W.N. 262 = 163 I.C. 814 = A.I.R. 1936 Oudh 185.

Or 47, r. 4—Consent decree—review on ground of fraud or mistake, if permissible.

A review of a consent decree on the ground that it was obtained by mistake, cannot be had, and the consent decree can be set aside only by means of a separate suit, 3 Lah. 127 followed; 57 Cal. 154 relied on, (*Dunkley J.*)

U PO HTU vs. MA THIAN YIN.

A.I.R. 1936 Rang. 389 = 164 I.C. 785(2)

Or. 47, r. 1—Plaint rejected for non-payment of Court-fee—when may be restored.

Where a plaint is rejected for non-payment of Court fee on account of the fraud of the karpardaz of the plaintiff, the Court has power to restore the suit, on an application for review by the plaintiff. 4 Pat. 180, 39 O. W. N. I (P. C.) 3 Lah. 127

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(P. C.) referred. (*Muhammed Noor & Varma JJ.*)

JADUNANDAN SINGH vs. SANKAR SAHU.

A.I.R. 1936 Pat. 310 = 162 I.C. 992 = 17 P.L.T. 766.

Or. 47, r. 1—Suit for produce rent—landlord not producing takhmima sheet on false pretext—suit decree—landlord subsequently filing the papers in another suit—tenant, if can be apply for review.

In a suit by a landlord for produce rent according to takhmima sheet, the tenant pleaded in defence that the takhmima sheet was false and the suit had been maliciously brought against him. The tenant applied for the production of the village papers, but the landlord evaded their production on a false pretext. The suit was decreed by the trial court and the decree was affirmed in appeal by the High Court. Subsequently the tenant having traced the village papers which the landlords had evaded producing, but which he had now filed in another case, the tenant applied for review of judgment. Held, that under the circumstances, the appellant was entitled to review of judgment on the ground of discovery of new and important evidence. (*Macpherson & James JJ.*)

BRINDABAN PROSAD vs. BANKU BEHARI MITRA.

15 Pat. 295 = 17 Pat. L.T. 575 = A.I.R. 1936 Pat. 595.

Or. 47, rr. 2 & 4 Order granting review, if appealable.

When a review is granted, an appeal is permissible only on the specified grounds and they are, if the order contravenes the provision of r. 2, or r. 4 of Or. 47, or if the application for review is barred by limitation. (*Mohammed Noor & Varma JJ.*)

JADUNANDAN SINGH vs. SANKAR SAHU.

A.I.R. 1936 Pat. 310 = 162 I.C. 992 = 17 Pat. L.T. 766.

Sch. II—Award made on an agreement to refer future disputes to arbitration, if valid.

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An award made on an agreement to refer future disputes to arbitration is perfectly valid there being nothing illegal in such an agreement. There is nothing in Sch. II, Cr. C. P. Code which declares such agreement to be invalid. Such an award therefore can be legally filed in Court. (*Jailai J.*)

RAMDHAN DAS RAMJIDAS vs. SANKAR DAS DEBIDOYAL

A.I.R. 1936 Lah. 492 = 164 I.C. 296.

Sch. II, para. 10—*Court's power to refuse to file Award which has been accepted by parties.*

When an award has been accepted by the parties and an application made to the Court for filing it, it is not open to the Court to refuse to do so on the basis of any extra-judicial correspondence between the Court and another officer of the High Court. (*Monroe J.*)

KANSHI RAM vs. SAMPURAN SINGH.

38 P.L.R. 318.

Sch. II, paras. 10, 20 & 21—*Power of Court to give effect to oral award.*

Where the arbitrators to whom a dispute had been referred by the parties without the intervention of the Court delivered an unanimous oral award but later one of the arbitrators refused to sign the oral award when reduced to writing held, that an award under the general law need not necessarily be in writing, and therefore the oral award given by arbitrators was complete when it was delivered and it was competent for the Court to give effect to it. 26, Bom. 132 relied on. (*Venkata Subba Rao J.*)

THOTTAN VEERAN MUHAMMED vs. MALAYITHOTI MAVAKKAMTHI.

71 M.L.J. 342 = 44 M.L.W. 32 = 1936 M.W.N. 768 = 164 I.C. 685 = A.I.R. 1936 Mad 713.

Sch. II, para. 14 & 15—*Mistake by arbitrators if renders award liable to be set aside.*

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Where the parties have selected their Judge it is necessary to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. Unless the character of the mistakes committed by the arbitrators verges upon misconduct their decisions will be upheld. The arbitrators have considerable authority in deciding matters referred to them as if by way of appeal. (*Pollock J.*)

TULSIRAM & ANR. vs. JHANAK LAL.

19 N.L.J. 151 = I.L.R. 1936 Nag. 44 = 165 I.C. 556 = A.I.R. 1936 Nag. 197

Sch. II para. 15—*Decree passed on award after disposing objection to appeal or revision.*

Only one Court, namely, the Court which referred the case to arbitration has jurisdiction to decide the question whether the award given by the arbitrator is invalid not only for the reason specifically mentioned in Cl. (c) but on other grounds also. This being so the decree passed by a Court in terms of an award, after it has disposed of the objections under para 15 of Sch. II, C. P. Code, is final and not open to appeal and to allow a revision would be more objectionable than an appeal in such a case. Moreover the arbitration proceedings are merely a ramification of the main suit which is still pending and which would be disposed of on the termination of the proceedings. The order of the Court is therefore "an interlocutory order and no revision lies against it. 29 Cal. 167; 15 Lah. 715 & 5 Lah. 283 followed. (*Agha Haidar J.*)

ASA vs. MST. BHURAN.

A.I.R. 1936 Lah. 466 = 163 I.C. 390 = 38 P.L.R. 725.

Sch. II, para. 14—*Meaning of misconduct—Refusal to hear parties or their witnesses, if misconduct.*

An arbitrator though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties and if requested, their witnesses, unless he is absolved therefrom by the terms of submission and must apply his mind to the points

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in dispute and decide it according to the ordinary rules of justice, equity and good conscience. The failure to hear the parties, and if necessary, their witnesses, unless absolved therefrom by the terms of submission, amounts to misconduct on the part of the arbitrator within the meaning of para. 16, Sch. 2, C. P. Code, 9 All. 253, 42 All. 136, 36 All. 1936 (P. C.); and 3 Rang. 137 referred to. (*Mosely & Ba U JJ.*)

MA HNINE LE vs. NYEINE BWIN.

A.I.R. 1936 Rang. 191 = 162 I.C. 772.

Sch. II, paras 15 & 16—Decree passed in accordance with award, if subject to appeal or revision.

Once a decree is passed in accordance with an award, no appeal lies against it except on the grounds mentioned in para 16 (2) of Sch. II, C. P. Code. No appeal lies against a decree on the ground that the reference to arbitration was invalid as all the interested parties did not join in making the reference. Para. 15 (1) (c) shows that all objections against the validity of an award can be brought in the Court making the reference, the words "or being otherwise invalid" being wide enough to cover all kinds of objections to an award. (*Sri-vastava & Zia-ul Hasan JJ.*)

RADHEY LAL vs. SUNDER DEI.

1936 O.W.N. 13 = 159 I.C. 1041.

Sch. II, para. 17—Appeal if lies from a decree on the basis of an award given under para. 17.

An agreement to refer to arbitration having been filed in Court under Sch. II, para. 17, C. P. Code, the case was referred to arbitrators who in due course gave their award. Time to file objections to the award was given by the Court, but no objection having been filed, the Court proceeded to judgment and passed a decree in accordance with the award. Some of the parties to the arbitration thereupon appealed to the High Court. Held, that no appeal was maintainable against a decree following an award arrived at under Sch. II, para. 17, C. P.

C. P. Code—(Contd.)

Code, except in so far as the decree is in variance with the award. (*Tek Chand & Dalip Singh JJ.*)

LAL CHAND vs. MEGHA RAM.

160 I.C. 1075 = A.I.R. 1936 Lah. 617.

Sch. II, para. 20—Arbitrator, if a necessary party, in an action to enforce award.

There is no provision of Law under which it is necessary to make the arbitrators parties to proceedings under Sch. 2, para. 20 of the C. P. Code, inviting the Court to pass a decree in terms of the award by the arbitrators. (*Courtney Terrel C. J. & Varma J.*)

PANCHU MANDAL vs. GENA MANDER.

17 P.L.T. 20 = 161 I.C. 691 = A.I.R. 1936 Pat. 161.

Sch. II, para. 20—Person applying for filing award, objecting to a portion of the award—procedure to be followed by the Court.

There is no law preventing a person under para. 20 of Sch. 2 of the Code of Civil Procedure to file an award made without the intervention of the Court, from objecting to a portion of the award. At the same time there is no provision entitling an applicant to ask the Court to file a part of the award. In such a case, the procedure to be followed by the Court is either to ignore the subsequent illegal prayer or to allow the applicant to amend his application by deleting such prayer. (*Jailal J.*)

SANGAT RAI vs. SITAL PERSHAD.

38 P.L.R. 86 = 164 I.C. 543 = A.I.R. 1936 Lah. 682.

COMPANIES ACT (VII OF 1913).

Secs. 6, 10, 12 & 72—Situation of the registered office of a Company if can be changed—manner in which the change can be effected.

Companies Act—(Contd.)

A statement in the memorandum of association of a Company that its registered office would be situated in a particular town is not a condition in the constitution of the company. The company can, by resolution and upon giving notice in accordance with the provisions of the Companies Act, alter the situation of its registered office from one place to another in the same province. (*Mc Nair J.*)

ARYYA INSURANCE CO. LTD., IN RE.

63 Cal. 773.

Sec. 30 (2)—*Person to whom shares transferred holding out that he is shareholder—such person if can, on the company going into liquidation deny the validity of the transfer of shares to him.*

Where a person has been given shares or shares have been transferred to him as a qualification of directorship, he becomes thereby a member of the Company within the meaning of Sec. 30 (2), Companies Act. He cannot subsequently after having held himself out as a shareholder and member of the Company deny his liability on the Company going into liquidation on the ground that the transfer of shares to him was a mere colourable transaction. He cannot object to his name being included in the list of contributories. (*Young C. J.*)

MUTHU RAJ BHALLA vs. PEOPLE'S BANK OF NORTHERN INDIA LTD.

17 Lah. 576 = A.I.R. 1936 Lah. 480 = 38 P.L.R. 316 = 163 I.C. 670.

Secs. 31 & 156—*Register of shareholders how far conclusive as to number of shares held by a particular shareholder.*

The register of shareholders in a company is not absolutely conclusive as to the number of shares held by a person but it is necessary not only from the point of view of law but a matter of policy also to see that the register is as conclusive as it can be made consistently with a proper interpretation of the Companies Act. When a shareholder has been treated as such and acted as such he cannot go back and deny his position to protect himself from liability, specially when he has full knowledge of

Companies Act—(Contd.)

his real position; the shareholder is as much estopped from going against the register and disowning liability as the company is estopped from questioning his title when once he is put upon register. (*B. J. Wadia J.*)

PENINSULAR LIFE ASSURANCE CO. LTD., IN RE.

60 Bom. 297.

Secs. 31 & 156—*Person liable in respect of shares of a company.*

The Company and where the company has gone into liquidation, the liquidator is not concerned with the persons paying the consideration for the shares of the company. When the shares have been transferred, the person who signed the transfer form as the purchaser and whose name is entered as owner of the shares in the share register with his knowledge and consent is the contributory who is liable in respect thereof. A person who executes the transfer form of shares in a company remains liable unless and until the transferee's name is entered in the register; the dividends on the shares are also payable to the transferor, for he is deemed to be the holder of the shares until the entry is made. (*B. J. Wadia, J.*)

PENINSULAR LIFE ASSURANCE CO. LTD., IN RE.

60 Bom. 297.

Sec. 34—*Irregularity in meeting of directors for confirming transfer of shares, if invalidates transfer.*

An irregularity in a meeting of directors held for confirming a transfer of shares for want of notice does not invalidate a transfer duly made. It is sufficient, if at the date of the winding up there is upon the register the transferee who is legally liable to the company in respect of these shares. (*B. J. Wadia J.*)

PENINSULAR LIFE ASSURANCE CO. LTD., IN RE.

60 Bom. 297.

Sec. 36—*Copy of register of the members of the Company—Company Judge, if*

Companies Act—(Contd.).

can order company to furnish such copy to a share-holder.

A Company Judge has jurisdiction to order a company to deliver a copy of the register of the members of the company to a share holder of the company. (*Iqbal Ahmed & Harris JJ.*)

BRITISH INDIA CORPORATION LTD. vs. ROBERT MENZIS.

1936 A.W.R. 465 = 1936 A.L.J. 748 = 164 I.C. 387 = A.I.R. 1936 All. 563.

Sec. 38—Articles of Company—Directors carrying out their provisions—Powers of the Court to make enquiries.

It is indisputable that a member of a company and those claiming through him are bound by the Company's Articles of Association. It forms a contract between them, and in any case in which the Company and its directors literally and bonafide carry out the provisions, of the Company's articles of association, it or they cannot be said to be acting "without sufficient cause". It is misreading of those words under Sec. 38, Companies Act to suppose that they confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable. (*Braund J.*)

V. E. R. M. N. R. M. KASI BISWANATHAM CHETTIAR vs. INDO-BURMA PETROLEUM CO., LTD.

A.I.R. 1936 Rang. 52.

Sec. 31 (1)—Order for rectification of share, if can be passed when name of share-holder not shown to have been registered fraudulently or without sufficient cause.

An order for rectification of the share register by deleting certain number of shares standing against the name of the shareholder applying for rectification ought not to be passed where such shareholder fails to show that his name was entered in the register fraudulently or without sufficient cause, under Sec 38 (1) of the Companies Act, (*B. J. Wadia J.*)

PENINSULAR LIFE ASSURANCE CO. LTD., IN RE.

60 Bom. 397.

Companies Act—(Contd.).

Secs. 38 & 40—Entries in the Register of shareholders, if prima facie evidence of such person as is entitled to vote in a meeting authorising reduction of share capital.

Entries in the Register of share-holders of a company however improperly made of the names of certain person-as share-holders is unless steps are taken to have the register altered or rectified—prima-facie evidence that such persons are qualified share-holders entitled to take part and vote in the meeting of a company authorising a reduction of its share capital. (*Costello & Panckridge JJ.*)

MARWARI STORES LTD. vs. GOURI SHANKAR COENKA.

63 Cal. 703 = 40 C.W.N. 661 = 165 I.C. 406 = A.I.R. 1936 Cal. 327.

Secs. 38 & 184—Powers of the Court in dealing with an application under Sec. 38.

Sec 184, Companies Act incorporates Sec. 38. On an application under that section, the Court has power to decide any question relating to the title of the aggrieved person to have his name omitted from the register of shareholders and generally to decide any question necessary or expedient to be decided for the rectification of the register. The exercise of the jurisdiction given by the section is discretionary having regard to the person who is the applicant before the Court and to all the facts and circumstances of the cases, (*B. J. Wadia J.*)

PENINSULAR LIFE ASSURANCE CO., LTD., IN RE.

60 Bom. 297.

Sec. 55 (2) (b), 38 & 40—Capital lost or unrepresented and reduction of share capital—Application of confirmation by Court—Court if should insist on proof of such loss or non-representation

Where a resolution for reduction of share capital of a company is passed on the ground that capital has been lost or is unrepresented by available assets, it is expedient that the Court should in confirming such reduction, insist on some

Companies Act—(Contd.)

evidence of the existence of the state of facts referred to in the resolution. (*Costello & Panckridge JJ.*)

MARWARI STORES LTD. vs. GOURI SHANKAR GOENKA.

63 Cal. 703 = 40 C.W.N. 661 = 165 I.C. 408 = A.I.R. 1936 Cal. 337.

Sec. 92 (5) — Prospectus in English filed with Registrar—prospectus in Bengali substantially identical with that filed but not containing certain particulars required by law — promoters, if liable to be convicted.

When the promoters of a company file with the Registrar a prospectus in English fulfilling all the requirements in law but they also issue prospectus in Bengali which though substantially identical with that filed, is not a verbatim translation thereof, in that it omits certain particulars required by Sec. 93 of the Companies Act, they are liable to be convicted under Sec. 92 (5) of the Act. (*Guho & Bartley JJ.*)

SUPERINTENDENT & REMEMBRANCE OF LEGAL AFFAIRS, BENGAL vs. BENGAL SALT COMPANY LTD.

41 C.W.N. 320 = 63 C.L.J. 188 = 160 I.C. 829 = A.I.R. 1936 Cal. 33.

Sec 109 — Unregistered mortgage — invalidity of decree on such mortgage against liquidator and creditors of a Company.

A charge which is not registered under Sec. 109 of the Indian Companies Act is void against all the creditors of a Company irrespective of the date on which their debts accrued, and the fact that decrees have been obtained, on such unregistered mortgages, prior to the winding up application, does not take it out of the operation of Sec. 109. Such a decree-holder cannot stand outside the winding up and realise his security, thereby diminishing the assets divisible amongst creditors. (*Panckridge J.*)

SATHGRAM COAL CO., LTD., In the matter of.

40 C.W.N. 1171.

Sec. 152 — Reference to arbitration in writing and according to provisions of Arbitration Act—Reference to Arbitration by Court Appeal, if lies.

Companies Act—(Contd.)

Sec. 152, Companies Act applies to those cases only in which a joint stock company by written agreement refers to arbitration in accordance with the provisions of the Indian Arbitration Act any dispute between itself and another company or person. Where the reference to arbitration is not by written agreement of the parties but is made by the Court in a pending suit, the arbitrator has to submit his report to the Court which has to pass a decree in the suit in accordance with the terms of the award or pass such other order in accordance with law as it thinks fit. Such a decree is clearly open to appeal in the ordinary course. In these cases, the reference or the award passed thereon, is not made under the provisions of the Indian Arbitration Act, and Sec. 152, Companies Act, has no applicability to it. (*Tekchand & Dalip Singh JJ.*)

PUNJAB & KASHMIR BANK, LTD., RAWALPINDI vs SMT. DAMODRI.

A.I.R. 1936 Lah. 257 = 165 I.C. 339.

Sec. 153 — Scheme of composition to enable insolvent banks to carry on — sanction, if to be granted by the Court.

The sanction of the Court will not be given to a scheme of composition and arrangement, which will have the effect of enabling a bank, which is to all intents and purposes insolvent, having for its assets only money lent out on mortgage, simple bonds and promissory notes, decrees of court, etc., but no cash, to continue to carry on business and attract new deposits. (*Panckridge J.*)

NILPHAMARI LAUXMI BANK LTD., IN RE.

63 Cal. 99.

Sec. 153 — Scheme of arrangement between the company and depositors, if binds depositors who had obtained decrees prior to meeting — Agreement with majority of one class of creditors, if binds all of that class — Agreement if binds another class — Agreement with depositors, if necessarily binds all creditors.

Companies Act—(Contd.)

An agreement of the majority of the creditors with the Company under Sec. 153 of the Companies Act binds all who fall within the class represented by the said majority. But an agreement arrived at by one class of creditors will not bar another class which has not been party to it; and consequently an agreement entered into by depositors would not necessarily bind creditors who might conceivably include a much larger body of claimants. Also a scheme of arrangement between a company and its depositors would not bind depositors who had already obtained decrees before the date of the meeting even though the depositors at their meeting may purport to treat themselves and the decree-holder depositors as creditors equally bound by the scheme 38 C. W. N. 1171 followed, (*Guha & Bartley JJ.*)

MANICKGANJ TRADING & BANKING CO. LTD. vs. MADHABENDRA KUMAR SAHA & ANR.

40 C.W.N. 580 = A.I.R. 1936 Cal. 162.

Sec. 153—*Scheme passed by depositors of a company relating to distribution of funds among depositors sanctioned by Court—Depositor who had obtained decree prior to such claim, if competent to execute his decree.*

The depositors of a Company at a meeting passed a scheme providing for the distribution of the available funds among the depositors who were to be deemed as creditors *pro rata*. The scheme was sanctioned by the Court. Subsequently a depositor creditor who had previously obtained a decree took out execution of his decree and it was contended that in view of the scheme adopted under Sec. 153, Companies Act, it was not open to the said decree-holder to proceed with the execution of his decree. *Held*, that the scheme could not possibly be held to apply to a depositor creditor who had obtained a decree before the passing of the scheme, as such a decree-holder must be deemed to have ceased to be a depositor. The application for execution was therefore maintainable. (*Guha & Bartley JJ.*)

NOAKHALI LOAN CO. LD. vs. HEMEN-TA NARAIN ROY.

A.I.R. 1936 Cal. 402.

Companies Act—(Contd.)

Sec. 153—*Scheme of composition sanctioned by High Court and particular decree holder held bound thereby—Execution proceedings started by such decree-holder in Mofussil Court after getting decree transferred thereto—High Court, if may restrain such proceedings by injunction.*

When a scheme of composition under Sec. 153, Companies Act has been sanctioned by the High Court and it has been decided that a particular decree holder is bound thereby, the High Court has power to restrain by injunction proceedings in execution started by the decree-holder in a Mofussil Court after getting the decree transferred there. (*Mc Nair J.*)

JALPAIGURI BANKING & TRADING CORP. LTD. IN RE.

40 C.W.N. 551 = 165 I.C. 655 = A.I.R. 1936 Cal. 662.

Sec. 156—*Shares forfeited for non-payment of call, if subject to new liability created by Sec. 156.*

A share-holder who has forfeited the shares held by him for non-payment of call is nevertheless still subject to a new liability created by Sec. 156, Companies Act, for payment of the amount unpaid on the shares in respect of which he is liable as past member. He is not however liable for interest. (*Monroe J.*)

PARS RAM BRIJKISHORE FIRM vs. JAGRAON TRADING SYNDICATE LTD.

33 P.L.R. 693 = A.I.R. 1936 Lah. 226 = 163 I.C. 126.

Sec. 156—*Interest, if can be awarded prior to payment order.*

The liability created by Sec. 156, Companies Act is a new liability and no provision is made for interest therein. It may be that when a Court makes a payment order under that section, it can direct future interest on the amount fixed in the payment order until realisation, but it cannot include interest prior to that time. (*Addison & Abdul Raschid JJ.*)

PARS RAM BRIJ KISHORE vs. JAGRAON TRADING SYNDICATE, LTD.

A.I.R. 1936 Lah. 739.

Companies Act—(Contd.)

Sec. 156 (1) (iii)—*On winding up of Company, past members, if can be asked to contribute before existing members are called upon to contribute unpaid amount of their share money*

On the winding up of a Company, a past member of the Company on List C, cannot be asked to contribute until the existing members in List A have been called upon to contribute to the full extent of the unpaid amount of their share money and until List A is exhausted. 163 I. C. 126 reversed. (*Addison & Abdul Rashid JJ.*)

PARS RAM BRIJ KISHORE vs. JAGRAON TRADING SYNDICATE LTD.

A.I.R. 1936 Lah 739.

Sec. 171—*Leave under the section, if may be obtained subsequent to the institution of a suit.*

Under Sec. 171 of the Companies Act, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been initiated prior to the winding up order. The Court has no jurisdiction to give the plaintiff leave to continue the suit instituted without leave, subsequent to the winding up order (*Panckridge J.*)

S. EEL CONSTRUCTION CO., LTD., RE:
40 C.W.N. 312.

Sec. 171—*Suit by Company under liquidation—leave of Court obtained after institution, but within period of limitation—maintainability.*

If a suit by a company under liquidation has been instituted without leave of Court, but such leave has been subsequently obtained within the period of limitation, it is not proper to dismiss the suit, and to compel the plaintiff to bring another suit, after obtaining the leave. (*Addison & Abdul Raschid JJ.*)

PEOPLE'S BANK OF NORTHERN INDIA LTD. vs. FATEH CHAND & CO.

38 P.L.R. 1104=A.I.R. 1936 Cal. 401
=164 I.C. 136.

Sec. 175—*Voluntary winding up—creditor applying for appointment of Offi-*

Companies Act—(Contd.)

cial Liquidator—application, if can be treated as one for compulsory liquidation.

The Court has no power to waive any irregularity as regards the strict compliance with the law laid down in the Companies Act and the rules made thereunder. Under the law, an Official Liquidator can only be appointed when a compulsory winding up order is made. But where an application is made for the voluntary winding up of a Company and for the appointment of the Official Liquidator for effecting the same, the Court cannot treat the application as an application for compulsory winding up of the Company. If the application is treated as a petition for supervision, or some such order as the Court might be empowered to make in the case of a compulsory winding up, the Court must before passing such an order, be satisfied that the winding up had taken place. A supervision order can be made only where there is a valid winding up. But when the whole case of the petitioner is that the winding up was *ultra vires* and void, the petition cannot be treated as one for supervision. (*Wort J.*)

KAMESHWAR SINGH vs. AMBLER STATE & STONE CO. LTD.

162 I.C. 218=A.I.R. 1936 Pat. 468.

Sec. 176 (1)—*Removal of Liquidator by Court on due cause shown—Due cause, measure of.*

The measure of "due cause" in Sec. 176 of the Companies Act is the real, substantial and honest interest of liquidation. Where the circumstances suggested that it was not the real, substantial and honest interest of the liquidation that the present Liquidator should be removed, the Court declined to make an order removing the Liquidator even where the Liquidator was clearly guilty of neglect in carrying out the specific order of the Court and the specific rules which have been laid down in the Companies Act. (*McNair J.*)

PABNA DHANABHANDAR CO. LTD., IN RE.

40 C.W.N. 857=165 I.C. 108.

Sec. 185—*Chairman purchasing property with Bank's money taken by him*

Companies Act—(Contd.)

illegally—Liquidation of Bank—Liquidator's claim to such property if allowable.

Where the Chairman of a Bank took money illegally from the Bank, and with such money purchased property in his own name, and the Bank subsequently going into liquidation, the property was claimed by the liquidators of the Bank, *held*, that the Court could without arriving at a final decision of title, order the property to be returned to the Bank, through its liquidators. (*Young C. J. & Monroe J.*)

PEOPLE'S BANK OF NORTHERN INDIA LTD vs. HARKISHEN LAL.

38 P.L.R. 1104 = A.I.R. 1936 Kah. 408 = 163 I.C. 378.

Sec. 186—Company appointed and acting as Liquidator—Legality of appointment, if can be questioned in proceedings of payment order under the Section.

Where the memorandum of association of a company showed that one of the objects of the company was to manage estates and the company on the basis of this undertook to act as a liquidator of another company *held*, that the Company having been appointed a liquidator and having accepted the position, the legality of this appointment could not be questioned in proceedings under Sec. 186, Companies Act, for a payment order. (*Jaital J.*)

SHANTI LALL vs. LYLLEPUR BANK LTD. (in liquidation.)

A.I.R. 1936 Lah. 276 = 63 I.C. 306.

Sec. 183—Interpretation of the section.

Sec. 183, Companies Act, means that where an order may be passed against a purchaser to pay to the liquidator, it may be passed against the purchaser to pay to the bank. The section does not give jurisdiction to the Company Judge directing the winding up of the Company to an order against persons other than contributories or persons mentioned in Sec 185. (*Sulaiman C. J. & Bennet J.*)

JOHN BROTHERS, AGRA vs. OFFICIAL LIQUIDATOR, AGRA SPINNING & WEAVING MILLS Co., LTD.

1936 A.L.J. 741 = 1936 A.W.R. 537 = 165 I.C. 790 = A.I.R. 1936 All. 808.

Companies Act—(Contd.)

Sec. 188—"Purchaser" and "other persons from whom money is due"—Meaning of the expressions.

The word "purchaser" in Sec. 188, Companies Act must be taken to refer to the word "contributory" which immediately precedes it, and it means the purchaser of the interest of a contributory. The words "or other persons from whom money is due" in Sec. 188, refers to persons from whom money is due under Sec. 185 of the Act, so far as it is intended that an order enforcing a payment should be made. (*Sulaiman C. J. & Bennet J.*)

JOHN BROTHERS AGRA vs. OFFICIAL LIQUIDATOR AGRA SPINNING & WEAVING MILLS Co. LTD.

1936 A.L.J. 741 = 1936 A.W.R. 537 = 165 I.C. 790 = A.I.R. 1936 All. 808.

Sec. 188—Persons entering into contract with liquidator of a company—Court, if has jurisdiction to direct such person in a summary manner to make certain payments.

On the failure of the appellant to pay the amount due from him under a contract entered into by him with the liquidator during the course of the liquidation of a company, the liquidator applied to the Court directing winding up, for directions; and the Court ordered the appellant to deposit the amount in a bank in the accounts of the Company and if the deposit was not made within a week, the order was to be executed as a simple money decree. *Held*, that the Court had no jurisdiction under the Companies Act to make such an order. (*Sulaiman C. J. & Bennet J.*)

JOHN BROTHERS, AGRA vs. OFFICIAL LIQUIDATOR, AGRA SPINNING & WEAVING MILLS Co., LTD.

1936 A.L.J. 741 = 1936 A.W.R. 537 = 165 I.C. 790 = A.I.R. 1936 All. 808.

Secs. 230 & 234—Discretion of Court to order payment in full to any class of creditor.

The creditors referred to in Sec. 230, Companies Act, are persons entitled to priority under the Statute and as of right,

Companies Act—(Contd.)

but the Court has under Sec. 234 of the Act been allowed a discretion to order payment in full to any classes of creditors other than those referred to in Sec. 230. Where the discretion used by the trial Judge under Sec. 234 is not capricious or in disregard of any legal principle, the Appellate Court will not interfere with the exercise of the discretion. (*King C. J. & Thomas J.*)

PEOPLES BANK OF NORTHERN INDIA LTD., LAHORE vs. LUCKNOW SUGAR WORKS LTD, LUCKNOW.

1936 O.W.N. 639=163 I. C. 194=
A.I.R. 1936 Oudh. 338.

Sec. 282—Balance sheet showing under heading "deposits by others" not gross amount but net amount after deduction of loan granted, if in accordance with law.

Where in the balance sheet of a cotton mill which did not do any subsidiary banking business but received deposits from its customers merely to assist its working capital, a certain amount was shown under heading "Deposits by others", but the amount shown did not represent the total figure of accumulated deposits but only the incorporated net figure after deducting the amount of a loan advanced to another mill which was nowhere separately shown, and it appeared that the Managing Directors responsible for the balance sheet had an interest in not disclosing the loan granted to the other mill: *Held*, that the offence under Sec. 282 Companies Act, of wilfully making a statement, false in a material particular had been committed in respect of the balance sheet. (*Cuniffe & Henderson JJ.*)

SUPERINTENDENT & REMEMBRANCER OF LEGAL AFFAIRS, BENGAL vs. AKHIL BANDHU GUHA.

40 C.W.N. 1341=A.I.R. 1936 Cal. 680.

Sch. I, Art 73—Power of the Directors in borrowing money.

Art. 73 of Sch. I of the Companies Act is the relevant article to be considered on the point of the powers of the Directors in borrowing money. The word "for the time being" in that article do not mean "when the claim is made." It cannot mean that whatever be the initial borrowing by the directors, that is not a matter to be enquired into by the Court. The article,

Companies Act—(Contd.)

in terms, fixes the limit at any time and although the validity of the claim may have to be considered in respect of the amount claimed on the date of liquidation, it cannot be said that the article in terms refers only to that point of time and no other. (*Beaumont C. J. & B. J. Wadia J.*)

T. R. PRATT (Bombay) LTD, vs. E. D. SASSON & CO., LTD. & ANR.

60 Bom. 326=37 Bom. L.R. 978=165
I.C. 126=A.I.R. 1936 Bom. 62.

COMPANY.

Application for winding up of a company—Factors that should be considered by the Court.

No general rule can be laid down as to the nature of the circumstances which has to be borne in mind in considering whether it is just and equitable to wind up a company on a petition for compulsory winding up. The decisive question must be the question whether at the date of the presentation of the winding up petition, there is reasonable hope that the object of trading at a profit with a view to which the company is formed can be attained. In considering that question, the guarantee of the preference shares should be left out of sight except in so far as it may have biased the evidence on either side. (*Lord Maugham.*)

D. DAVIS & CO. LTD. vs. BRUNSWICK (Australia) LTD. & ORS.

A.I.R. 1936 P.C. 114=161 I.C. 539.

Winding up of a company—Right and privileges of ordinary share-holders.

The position of the Court in determining whether it is just and equitable to wind up a company requires a fair consideration of all the circumstances connected with the formation and the carrying on of the company; and the common misfortune which had befallen some share-holders in the company does not involve the consequence that the ultimate desires and hopes of the ordinary share-holders should be disregarded merely because there is a strong interest in favour of liquidation naturally felt by the holders of the preference shares. (*Lord Maugham.*)

D. DAVIS & CO. LTD. vs. BRUNSWICK (Australia) LTD.

A.I.R. 1936 P.C. 114=161 I.C. 539.

Company—(Contd.)

Petition for compulsory winding up—Future prospects of the company, if can be considered by the Court—Manner in which such future prospects should be determined.

There is obviously a great difference between a question of positive fact such as the pecuniary position of a trading company at a particular date and a question of the prospects of such a company in the future, a matter which must depend on all sorts of views as to the state of the world trade, the confidence of the public, the price at which articles can be sold, a matter which depends very largely upon the number of such sales and an infinity of other considerations very difficult either to summarise or to define. It is not the function of a court to determine such a matter on its own views as to probable success or failure, but to form the best opinion it can upon the evidence given by persons with a practical knowledge of trading questions and the local conditions where these affect the matter. (*Lord Maugham.*)

D. DAVIS & CO. LTD. vs. BRUNSWICK (Australia) LTD. & ORS.

AIR. 1936 P.C. 114 = 161 I.C. 539.

Meeting of Board of Directors—Notice of meeting—Service of notice, when may be assumed.

In order to convene a meeting of the board of a company, due notice of the meeting must be given to all the directors and in default of such notice, the meeting is irregular. Where, however, the absent director had knowledge of the meeting otherwise, no formal notice may be necessary. From the mere fact that there is nothing on record to show that notice was not given, the Court cannot assume that the notice was not given merely because there is an entry in the register of directors that a particular Director has ceased to be a director. It is for the party alleging that the meeting was irregular to prove to the satisfaction of the Court that the notice was not in fact given to the absent Directors. Generally, the Court is entitled to assume that everything has been done regularly and fit due course in absence of any evidence to the contrary. (*B. J. Wadia, J.*)

PENINSULAR LIFE ASSURANCE CO. LTD. IN RE.

60 Bom. 297.

Company—(Contd.)

Sanction of loan by Director on application which contains statements false to his knowledge—Director, if personally liable for the money.

A Director of a Bank acted dishonestly in sanctioning a loan to a person who was Munim of his firm, on an application which stated circumstances false to his knowledge. The money was not recoverable from the debtor as he was adjudicated an insolvent. *Held*, that the Director was personally liable for the loan on the basis of fraud. (*Coldstream & Jaisal JJ.*)

PEOPLES BANK OF NORTHERN INDIA LTD vs. HARGOPAL.

17 Lah. 262 = 38 P.L.R. 526 = A.I.R. 1936 Lah. 268 = 162 I.C. 204.

Director of Company who is also a creditor, obtaining undue preference for himself with knowledge of Company's insolvency, effect.

If a Director of a Company who is also a creditor knows that a Company is in a state of insolvency, that it cannot avoid being wound up, and with such knowledge obtains undue preference over other creditors (for example as by obtaining a hypothecation of the stock in trade and the outstandings), the transaction is liable to be set aside on the ground of fraud. (*Nasim Ali & Edgely JJ.*)

A. H. MOHAMMED ESMAIL & CO. vs. SACHCHIDANANDA BHATTACHARYA.

40 C.W.N. 769.

Application for shares—allotment not made within reasonable time, if invalid.

Where a person applied for some shares of a company on 10, 8, 30, and a letter was issued to him on 2, 3, 32 asking him to pay allotment money and also call money, and on the following day the company resolved to go into liquidation, *held*, that the letter calling for allotment money was highly suspicious, and since notice of allotment had been given, the allotment must be held to be invalid. (*Bhide J.*)

RADHEY SHAM BROPAR CO. LTD. vs. PARBHODYAI RAMDHAN.

38 P.L.R. 788 = A.I.R. 1936 Lah. 16 = 161 I.C. 294.

Company—(Contd.)

Delay in according sanction to the transfer of shares, if can justify payment of dividend to person not yet entered as member.

There is no authority for the proposition that a slight delay in according sanction to a transfer of shares would justify a payment of dividends to a person not yet entered as a member on the books of the Company, or that such delay would make the Company liable to an action for damage. (*Beckett J.*)

G. P. SONAWALLA vs. LAHORE ELECTRIC SUPPLY CO., LTD.

38 P.L.R. 742=159 I.C. 766=A.I.R. 1936 Lah. 207.

Questions whether, one man or more holds all the shares of a company, if relevant.

Under the law, a joint stock company is a distinct entity and although all the shares may be practically controlled by one person, in law, a company being a distinct entity, it is not permissible or relevant to enquire whether it is, as compendiously described, a "one man company". The law having recognised joint stock companies as distinct entities, these enquiries and suggestions are quite irrelevant. (*Beaumont, C. J. & B. J.*)

T. R. PRATT (Bombay), LTD. vs. E. D. SASSOON & CO., LTD. & ANR.

60 Bom. 326=A.I.R. 1939 Bom. 62=
37 Bom. L.R. 978=161 I.C. 126.

Right of company to recover calls, which are time-barred.

Where calls made by a Company are not paid and their recovery by the Company is time-barred, a liquidator appointed on the company going into voluntary liquidation, can have no higher rights than the Company, and he cannot therefore sue to recover the time-barred calls. (*Monroe J.*)

PARAS RAM BRIJKISHORE FIRM vs. JAGRAON TRADING SYNDICATE LTD.

38 P.L.R. 693=A.I.R. 1936 Lah. 226=
163 I.C. 126.

Knowledge of person who is officer of two companies in respect of one company, if can be imputed to the other company.

Company—(Contd.)

Where one person is an officer of two companies, his personal knowledge is not necessarily knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him by that company to receive the notice, and if the common officer has been guilty of fraud or even irregularity, the Court will not draw the inference that he has fulfilled these duties. (*Beaumont, C. J. & B. J. Wadia, J.*)

T. R. PRATT (Bombay), LTD. vs. E. D. SASSOON & CO. LTD. & ANR.

60 Bom. 322=A.I.R. 1936 Bom. 62=
37 Bom. L.R. 978=161 I.C. 126.

Contract by a company—Duty of people dealing with a joint stock company.

People dealing with a joint stock company are fixed with notice of any limitations on the power of the company contained in the Statute under which it is incorporated or in the memorandum of the Articles of Association; but if it is shown that a particular act was ostensibly authorised by the statute and the memorandum of the Articles of Association, persons dealing with the company are not concerned to see that the company has put itself into a position to exercise its powers properly. Outside parties are not concerned with the internal management of the company. They are, for instance, not concerned to see that there was a proper quorum of Directors present or that persons who are apparently Directors of the company had in fact been validly appointed. These are matters of internal management. If the disability of a Director to vote upon a contract in which he was personally interested were imposed, by the articles of association, the question whether he was personally interested in and entitled to vote upon, a particular contract, would be regarded as a matter of internal management with which persons dealing with a company would not be concerned. (*Beaumont, C. J. & B. J. Wadia, J.*)

T. R. PRATT (Bombay), LTD. vs. E. D. SASSOON & CO. LTD. & ANR.

60 Bom. 326=A.I.R. 1936 Bom. 62=
37 Bom. L.R. 978=163 I.C. 126.

Company — (Contd.)

Liability for costs of person disputing liability as contributory.

The costs of contest by a person disputing his liability as contributory and failing, must, except under very exceptional circumstances be paid by such contributory. There is no reason why the ordinary rule that a party failing must pay the costs should not apply in this class of cases (*B. J. Wodia, J.*)

PENINSULAR LIFE ASSURANCE CO. LTD., IN RE.

60 Bom. 297.

CONTRACT.

Time when can be said to be of the essence of the contract.

Time is not ordinarily of the essence of the contract, but the parties can make it so by express agreement in the contract itself, or subsequently by giving reasonable notice to complete on a certain day, or if the nature of the property intended to be sold requires it, as for instance, if the contract is for sale of a life interest of a mining lease given for a fixed period of time, (*R. C. Mitter, J.*)

KRISHNA CHANDRA RUDRA PAL vs. KHAN MAHMUD BEPARI & ORS.

63 Cal. 304 = 40 C.W.N. 859 = A.I.R. 1936 Cal. 51 = 161 I.C. 166.

Terms of contract, if can be added to or altered to relieve a party of hardship.

Where the rights and liabilities of the parties are regulated by contract, the terms of which could not be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. (*Courtney Terrel C. J., Macpherson & Fazl Ali JJ.*)

DUKHA LAL CHOWDHURI vs. MT. MANABATI.

15 Pat. 594 = 17 P.L.T. 339 = 163 I.C. 1003 = A.I.R. 1936 Pat. 314 (L.B.)

Contract — (Contd.)

Novation of contract — essentials of.

Where the debtors executed a promote in favour of the creditors, and subsequently they executed a bond for the same consideration, but subject to the fulfilment of a condition precedent to the validity of the bond, and such condition was not fulfilled, held, that there was no novation of contract and a suit could be maintained on the promote. 48 Mad. 693 & 4 Lah. 15; relied on. (*Tekchand & Abdul Rashid JJ*)

PREMDAS RADHAKISSEN vs. MOHAMED HUSSAIN KHAN.

A.I.R. 1936 Lah. 51 = 162 I.C. 882(2)

Minor inducing person by fraudulent misrepresentation to contract with, if can avoid the contract.

Where a minor induces a person to contract with him by means of a false representation that he was of full age, he is not estopped from avoiding the contract subsequently on the plea of his infancy. But the minor defendant should not be allowed to retain the benefit which he has received as a result of his fraudulent misrepresentation, and in a suit properly framed, he may be called upon to refund the consideration money which he had received. But he cannot be made liable to pay interest on such consideration money, because his liability in this respect arises not ex-contract but on equitable consideration. (*Edgley J.*)

MANMATHA KUMAR SAHA vs. EXCHANGE LOAN CO., LTD.

A.I.R. 1936 Cal. 567 = 165 I.C. 363.

Wagering contract — Nature of transaction — Intention of parties how should be ascertained.

In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstances to find out the true intention of the parties. These surrounding circumstances can only be proved by evidence outside the written contract and the Courts therefore, must look behind the form of the contract to the real intention of the parties, which may be gathered from the oral evidence and the actual transactions

Contract—(Contd.)

between them. 33 O. L. J. 533, 42 Bom. 473 followed; 24 Bom. 227 distinguished. (*Agha Haidar J.*)

LOKENATH vs. S. GOPAL SINGH HIRA SINGH.

A.I.R. 1936 Lah. 215 = 161 I.C. 713.

Clause providing for adjudication of disputes between contracting parties by third person, if valid—powers of such third person.

A clause in a contract to the effect that no cause of action can accrue until a third person has decided on any difference that may arise between the contracting parties is perfectly valid in law and this even where such referee has power to determine liability, and his decision is not limited to quantum, is binding on all parties and is final for all intents and purposes without any appeal. 11 Cal. 292 relied on (*Panckridge J.*)

M. D'CRUZ vs. SECRETARY OF STATE.

40 C.W.N. 865

Principle & Agent—Renewal commission, if payable to a discharged canvasser of a Life Insurance Co., on Policies effected through the latter.

Where by the terms of a contract between a Life Insurance Company and a canvasser, it was provided that the latter would receive commission on policies introduced by him at a certain rate on the first year's premium and certain other rates on the premium for subsequent years, but there was also a clause to the effect that the company would be entitled to terminate the arrangement with the canvasser at any time, and they dispensed with his services and refused to pay renewal commission thereafter on the policies introduced by him during the period of his services, *held*, (1) that under the contract the company had power to terminate the whole arrangement including payment of renewal commissions as they had in fact done; (2) that ordinarily and also as found as a matter of fact in the present case, the canvasser's duties in respect of a policy did not end with its introduction and acceptance and therefore the canvasser did not get renewal commis-

Contract—(Contd.)

sions after he had ceased to represent the company, even if there was no clause in the contract to the effect that the commission would be payable so long as the agent continues to represent the Company. (*S. K. Ghosh & Edgely JJ.*)

PROVAT KAMAL BASU vs. PHOENIX ASSURANCE CO. LTD.

40 C.W.N. 894 = 161 I.C. 525 = A.I.R. 1936 Cal. 246.

Mortgage executed for sum due on a previous account—Mortgage not completed—Suit for recovery of amount—Claim to recover barred—Suit, if maintainable.

The mortgagee's rights in certain trees were mortgaged to the plaintiff for a sum due under a previous account. The registration of the document having for a certain reason been refused, the plaintiff instituted a suit for the recovery of the amount due in respect of the mortgage for failure of consideration. It was found that at the date of the mortgage deed the claim to recover the amount in respect of which the mortgage was sought to be executed had already been barred. *Held*, that the debt for which the mortgage was given being barred by statute, there was no consideration for the mortgage, and the suit was therefore not maintainable. (*Monroe J.*)

BARU MAL vs. DAULATRAM.

A.I.R. 1936 Lah. 164 = 161 I.C. 703(2).

Persons getting to estate of deceased Hindu and contracting to pay maintenance to widow—Sale of estate to third party who undertakes to continue maintenance—Assignee from widow of arrears of maintenance if can sue vendee.

When certain persons getting the estate of a deceased Hindu bind themselves by a Solenama to pay maintenance to his widow in exchange for her interest in the lands, and thereafter they sell the lands to a third party who undertakes by the sale deed to continue the maintenance, the widow is in the position of cestui que trust, vis-a-vis the contracting parties, though a stranger to the contract may sue the vendee for

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arrears of maintenance. So may also an assignee from her of arrears of maintenance. (*Cunliffe & Henderson JJ.*)

HAREKRISHNA NAIK vs. FAKIR CHANDRA PAUL.

40 C.W.N. 703 = 162 I.C. 784 = A.I.R. 1936 Cal. 260.

Grain pits sold by means of slip called langots drawn by the filler of pits—slips providing that filler of pits will deliver grain to party who brings slips—liability of intermediate purchasers to ultimate holders of slips for non-delivery on due date.

Certain grain pits were sold by means of slips called "langots" in the market and the slips, which were drawn by the filler of the pits provided, *inter alia*, that "the goods entered in the purcha of the grain pit shall be delivered by us to the party who—after sale and resale from the party to another—brings this purcha to us after receiving from him the remaining amount and interest less the amount of (Sv) margin money." *Held*, that this condition in the slip placed the filler of the pit under an obligation to give delivery of grain pit on the due date to the ultimate purchaser of the purcha provided the last purchaser was ready and willing to pay the amount due on account of the price of the grain pit at the rate stated in the slip after deducting the margin money originally paid to the filler of the pit. The condition absolved the intermediate purchasers from responsibility to each successive purchaser, and the contractual liability existed only between the filler of the pit and the ultimate holder of the slip. Accordingly, an intermediate purchaser was not liable to the ultimate holder of the slip for the non delivery of the pits on the due date. (*Thom & Iqbal Ahmed JJ.*)

SHIKAR CHAND vs. SHANKAR LAL.

1936 A.L.J. 1012 = 1936 A.W.R. 834 = A.I.R. 1936 All. 706 = 165 I.C. 231.

CONTRACT ACT (IX OF 1872).

Sec 2(d)—Threat of bringing false suit, if good consideration for contract.

A threat of bringing a false suit, is really a form of blackmail and cannot be regarded as a good consideration for a

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contract. Such a contract must therefore be regarded as void for want of consideration under Sec. 25, Contract Act. (*Becket J*)

CHUNILAL vs. MAULA BUX.

A.I.R. 1936 6 = 161 I.C. 347 = 38 P.L.R. 727.

Secs. 11 & 65—Contract with person disqualified from contracting—validity of.

The question whether a contract is void or voidable presupposes the existence of a contract and cannot arise in the case of a person who is disqualified from contracting by any law to which he is subject. Sec. 65 has no application to such a case in which there never could have been any contract. (*Subhedar J. & Pollock A.C.J.*)

CHANDRA DWAJ DEO vs. ARTARAN DEO.

A.I.R. 1936 Nag. 15.

Sec. 16—High rate of interest, if evidence of undue influence.

The fact that the rate of interest in a case is somewhat high affords no evidence that there was any undue influence or that there was anything unfair in the transaction. (*Harries & Ganganath JJ.*)

IBNEY HASAN vs. GULKANDI LAL.

1936 A.W.R. 805 = A.I.R. 1936 All. 611 = 1936 A.L.J. 919 = 164 I.C. 325.

Sec. 16 (3)—Suit against son on a bond executed by father—Son contending absence of necessity—Burden of proving that contract induced by undue influence.

In a suit against the son on a bond executed by the father, the son set up certain defences, such as, that there was no necessity for the loan, but omitted entirely to raise the question of undue influence. *Held*, that it was only if that question had been raised and the Court had come to the conclusion that the necessary facts were existing to establish that *prima facie* the contract was obtained by undue influence, then the onus would have been on the plaintiff under Sub-Sec. (3) of Section 16, Contract Act to establish that

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it had been obtained by undue influence. (*Wort & Rowland, J.J.*)

BAHORE MAHTON vs. JERO SAHU.

160 I.C. 163 = A.I.R. 1936 Pat. 76.

Secs. 16 & 19A—Sale contract induced by undue influence—contract, if voidable at the option of the widow of the vendor.

Where an ignorant man whose mind was clouded and affected by hemp smoking had been prevailed upon by a person who had complete control over him to part with his property in favour of the former, the contract is voidable at the option of the vendor and after him, of his widow. In a suit by the vendee for possession of property, the widow can by way of defence, plead that the contract was not binding upon her husband and that it gave the vendee no rights what soever. (*Harries J.*)

MST. MANBHARI vs. SRI RAM.

1936 A.W.R. 720 = 1936 A.L.J. 1215
A.I.R. 1936 All. 673 = 165 I.C. 240.

Sec. 25—Son signing an acknowledgment in respect of debts of his deceased father—contract, if void for want of consideration.

Where on the death of a person, his son signs an acknowledgment in respect of the former's debts, it cannot be said that the transaction was without consideration inasmuch as the acknowledgment might have been signed to save the estate of his father from sale in execution of any decrees that might have been passed against such estate. Legally therefore, there was consideration for the balance signed by the son. (*Jailal J.*)

KUNDAN LAL MUNSHIRAM vs. RAGHUNANDAN LAL.

38 P.L.R. 85.

Sec. 25 (3)—Document containing express promise to pay a barred debt, if can constitute a valid contract.

A document containing an express promise to pay a sum of money representing a previous debt, which is time barred, constitutes a valid contract and can be

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enforced in Court. Oral evidence may be adduced for the purpose of connecting the express promise to pay with the previous time barred debt. 57 Cal. 394 & 60 Cal. 714 followed. (*R. C. Mitter J.*)

MAUTAZDDUIN vs. NAZAR MOHAMMED KHAN.

63 Cal. 759 = 40 C.W.N. 474.

Sec. 25 (3)—Renewal of a barred debt and forcibility of—knowledge of the promisor that the debt is barred how far relevant.

The renewal of a barred note is a promise in writing to pay the debt, (payment of which the creditor might have enforced but for the law of limitation), within the meaning of Sec. 25 (3) of the Indian Contract Act, and is therefore enforceable. The knowledge of the promisor is never a condition of liability under the Act. (*Panckridge J.*)

BANGSHIDHAR GOPALKA vs. A. C. BANERJEE & Co.

40 C.W.N. 130.

Sec. 30—Joint bet at horse race—one person receiving the money refusing to pay the other—right of the latter to recover his share by suit.

The plaintiff and the defendant went to horse races together, and they each put Rs. 10 - on the same horse, and the horse won. The person who actually entrusted the money to the bookmaker was the defendant, and he gave back to the plaintiff not Rs. 40 which was half the total win, but only Rs. 10 which corresponded to half of the original stake. In a suit by the plaintiff to recover his half share in the money, it was contended that the recovery of the money was barred by Sec. 30 of the Contract Act. *Held*, that Sec. 30 the Contract Act had no application to the case. The suit was one for money had and received to the benefit of the plaintiff, by the defendant, who was merely the agent of the plaintiff to make the bet. The plaintiff was therefore entitled to recover

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his share of the profits from the defendant. (*Stodart J.*)

MUTHUSWAMY PILLAI vs. VEERASWAMY PILLAI.

70 M.L.J. 433=1936 M.W.N. 572=
A.I.R. 1936 Mad. 486=163 I.C. 251.

Sec. 30—*Merchant buying goods in Japan and entering into contract with a bank for purchase of yen for paying value of goods in Rupees—Bank covering itself by yen purchased against yen sold—Transaction, if amounts to wagering contract.*

A merchant in Rangoon purchasing goods in Japan and desiring to pay for them in rupees and not in Yen entered into several contracts with a bank which took the form of a purchase of Yen to be delivered during a specified period at a fixed rate. The bank having entered into a contract of this description covered itself by purchasing Yen against the Yen that had been sold. *Held*, that the transaction between the parties could not be said to have been entered into by way of gambling or wagering and it was obligatory on the importer to pay the bills by purchase of Yen at the rate prescribed during the period to which the contracts related. In case of a failure to do so there was an actionable breach of contract. (*Page C. J. & Ba U, J.*)

ABDUL LATIF JAMAL & Co. vs. YOKOHAMA SPECIE BANK LTD.

A.I.R. 1936 Rang. 269=163 I.C. 516.

Sec. 55—*Time if essence of Contract for sale of land, whenever period for completion mentioned—Earnest money when forfeited in case of falling through of contract by vendee's laches.*

Time cannot be held to be of the essence of a contract for sale of land merely from the fact that a period for completion is mentioned. Time is not ordinarily of the essence of contract, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a day certain or if the nature

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of the property intended to be sold requires it. When a contract falls through by reason of the default of, or breach by the vendee, the earnest money is forfeited in the absence of a contract either express in its terms or to be inferred from the whole contract. (*R. C. Mitter J.*)

KRISHNA CH. RUDRAPAL vs. KHAN MAHMUD BEPARI.

63 Cal. 804=40 C.W.N. 659=191 I.C.
166=A.I.R. 1936 Cal. 51.

Secs 59-61—*Appropriation of payment in a case in which compound interest is provided, how to be made.*

The distinction that lies between principal and simple interest does not exist in the case of compound interest. In the case of simple interest, the interest remains always separate and apart from the principal. In the case of compound interest as soon as the interest falls due, it becomes a part of the principal and does not separate from the principal. In a case in which compound interest is provided, it is open to the mortgagee, as soon as interest falls due, to add it to the principal, and from the total amount, to deduct whatever is paid by the mortgagors on account of interest. (*Harries & Ganga Nath JJ.*)

BANARSI DAS & ORS. vs COLLECTOR OF SAHARANPUR.

1936 A.W.R. 887=1939 A.L.J. 1262=
A.I.R. 1936 All. 712=165 I.C. 498.

Sec. 62 *Agreement to pay debt in specified manner—validity of.*

On adjustment of accounts, a debtor acknowledged a certain sum as due to his creditor and agreed to repay it in a specified manner, viz. by conveying to the creditor certain properties against specified sums due and by paying the balance still due with interest, within a stated date. *Held*, that the agreement was, apart from Sec. 62 of the Contract Act, a valid and unconditional agreement. (*Panchridge J.*)

BRIJMOHAN vs. MAHABEERI.

63 Cal. 294=40 C.W.N. 808.

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Sec. 62—*Novation of contract—present substitution, if necessary.*

In order to constitute novation, there must be the present substitution of another contract for the original contract and not a mere agreement to substitute one in future. (*Bhide J.*)

GURANDITTA MAL SANT RAM vs. LABHU RAM LACHMAN DAS.

38 P.L.R. 155=163 I.C. 123=A.I.R. 1936 Lah. 476.

Sec. 65—*Cause of action arising during trial—Separate suit, if necessary.*

Sec. 65. Contract Act applies even to agreements that are void ab-initio. If a claim under this section is otherwise established, a separate suit for relief is not necessary even though technically the cause of action may have arisen when the contract was discovered to be void during the trial of the suit. (*Srivastava & Nannavetty JJ.*)

BHOLANATH vs. MAHRANI KUER.

1336 O.W.N. 489=162 I.C. 362=A.I.R. 1936 Oudh 280.

Sec. 65—*Contract of marriage between plaintiff's son and defendant's niece—breach by plaintiff-suit for recovery of ornaments, if maintainable.*

The plaintiff alleging a breach of contract of marriage between his son and the defendant's niece, sued to recover the value of ornaments presented by him to the defendant's niece. It was found that the breach had been committed by the plaintiff. There was no evidence to show that the defendant had any of the ornaments in his possession. *Held*, that the defendant could not be made liable to the plaintiff either for the return of the ornaments in question or for the value of them. (*Srivastava A. C. J. & Smith JJ.*)

JAGANNATH PROSAD vs. MUNNO LAL.

1936 O.W.N. 879=165 I.C. 247.

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Sec. 68—*Guardian taking loan on behalf of minor for necessity of minor's estate, if liable.*

When a loan is taken by a guardian on behalf of a minor for the purpose of meeting some necessity of the minor or for the benefit of the minor's estate, the minor's estate is liable. (*Thom & Bajpai JJ.*)

BENARES BANK LTD. vs. DIPCHAND.

1936 A.W.R. 87=1935 A.L.J. 155=A.I.R. 1936 All. 172=160 I.C. 64.

Sec. 68—*Supply of cloth and loan of money to repair minor's house—plaintiff, if entitled to interest.*

Cloth supplied to a minor and cash advanced for effecting necessary repairs in the house in which the minor lives, are necessities within the meaning of Sec. 68. Contract Act. Unless there is a supply contract, the claim arising out of Sec. 68 of the Contract Act, does not entitle the plaintiff to claim any interest on his claim. All that he is entitled to is reimbursement out of the minors estate. (*Grille, J. C.*)

RAMCHANDRA vs. HARI.

I.L.R. 1986 Nag. 12.

Sec. 69—*"Bound to pay"—payment by seputnidar to seputni for sale—putnidar if liable to seputnidar for such payment.*

The plaintiff seputnidar sued the putnidar and Darputnidar for recovery of the amount paid by him to avoid the sale of the putni under the putni regulation. It appeared from the Darputni kabuliyat that the darputni rent was to be paid in to the serista of the Zemindar and receipts taken from the Zemindar. The kabuliyat then stated "if you fail to pay the assigned darputni rent according to kists you shall remain bound to pay what sum will fall due to the Zemindar" on account of interests for defaulted kists, in terms of our putni kabuliyat. Before the putni rent became due the putnidar sold the putni to a person who did not cause himself to be registered in the Zemindary serista. *Held*, that no trust was intended to be created by the Darputni kabuliyat in favour of the Zemindar.

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dar, so as to entitle the latter to sue the Darputnidar. The stipulation in the kabuliyat was for the protection of the interest of the Darputnidar. The seputnidar being himself in default at the time when putni was advertised for sale, could not get any relief in equity. Hence the suit against the Darputnidar was liable to be dismissed. But the Putnidar who was liable to the Zemindar for Putni rent, though he transferred the putni to the unregistered person was liable to pay the amount to the plaintiff. (*D. N. Miller & Patterson, JJ.*)

ADHAR CHANDRA MONDAL vs. DOLGOVIDA DAS.

49 C.W.N. 1037 = 83 C.L.J. 287 = A.I.R. 1936 Cal. 663.

Sec. 69 *Joint debt—payment by one by executing mortgage deed—Debt not actually paid—Suit for contribution, if maintainable.*

The plaintiff and the defendant were jointly liable to a third party, and the plaintiff executed a deed of mortgage for paying off the joint debt, and sued the defendant for contribution. It was found that the plaintiff had not actually paid off the amount due to the third person out of the money raised on the mortgage. *Held*, that the payment made by the plaintiff by executing a mortgage deed was not such a payment as could entitle him to sue for contribution, unless and until the mortgagor redeemed the mortgages by paying up the mortgage money or the property was sold by the mortgages in satisfaction of the mortgage, (*Srivastava & Nanavutty JJ.*)

RAGHUBAR DAYAL vs. ABDUL GHAFAR.

1936 O.W.N. 301 = 161 I.C. 152 = A.I.R. 1936 Oudh 253.

Sec. 70 *Contract executed by an unauthorised person—party benefitted by the work done if bound to pay compensation.*

Where work is done by a person under a contract which has not been validly exe-

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cuted, but the person on whose behalf this contract has been executed either in wrong form or by an unauthorised person has taken the benefit of the work done by the other party, such person is bound to pay compensation to the other party under Sec. 70 of the Contract Act. (*Jai Lal J.*)

P. D. KHANNA & CO. vs. SECRETARY OF STATE FOR INDIA.

38 P.L.R. 618.

Sec. 73—*Suit for damages for breach of contract of sale—defendant, if entitled to credit for earnest money paid.*

A plaintiff suing for damages for breach of a contract of sale must give the defendant credit for any earnest money paid by him in assessing the amount of damages suffered by reason of the defendant's breach. (*Harries J.*)

MANGAL SEN CHANDRA BHAN vs. MALIK SINGH MOHAR SINGH

1936 A.W.R. 697 = 164 I.C. 317 = 1936 A.L.J. 937 = A.I.R. 1936 All. 566

Sec. 73—*Contract for sale of goods—Breach—Measure of damages.*

In the case of a breach of a contract of sale of goods, if there was an available market for the goods at the date of the breach, the damages must be based on the difference between the market price and the contract price. (*Bajpai J.*)

GOPAL DAS AGARWALLA vs. HARI KISHAN DAS.

1936 A.W.R. 591 = A.I.R. 1936 All. 514 = 163 I.C. 919.

Sec. 73—*Contract for sale and purchase of goods—breach of—damages how to be ascertained.*

Where in a contract for sale and purchase of goods the seller is put to considerable loss and expense by reason of the purchaser's wrongful rejection of the goods, the seller is entitled to the contract price of the goods, plus the expenses incurred less such sum as he obtained upon reselling the goods within a reasonable time. The

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seller must take all reasonable steps to mitigate his damages. (*Harries J.*)

MANGAL SEN CHANDRA BHAN vs. MALIK SINGH MOHAR SINGH.

1936 A.W.R. 697 = 164 I.C. 317 = 1936 A.L.J. 937 = A.I.R. 1936 All. 566.

Secs. 107 & 221—Agent purchasing goods with own money—Full in price of goods—Agent giving notice to principal of his intention to sell the goods if balance not paid Authority of agent to sell the goods in absence of instruction from principal.

An agent purchased certain goods with his own money on behalf of his principal. The price of the goods having begun to fall, the agent gave notices to the principal demanding the balance of the purchase money and stating that of the same was not paid, he would sell the goods. The notices having been ignored and no further instructions given by the principal, the agent sold the goods at the market. *Held*, that under the circumstances the agent must be deemed to have had implied authority to sell at the market rate i. e. on the best possible terms. The silence of the principal in spite of repeated notices could be regarded as amounting to his implied consent. The agent having paid for the goods was entitled to retain and resell the same as if he had been an unpaid seller. (*King C. J. & Nanavutty J.*)

JAGRAM DAS vs. BANARSI DAS & ANR.

1936 O.W.N. 528 = A.I.R. 1936 Oudh. 308 = 162 I.C. 745.

Sec. 125—Contract of indemnity—cause of action when accrues.

Under a contract of indemnity, the cause of action arises, when the damage which the indemnity is intended to cover is actually suffered. A man cannot be said to have been damaged so long as he is not deprived of anything. A mere remote chance of being deprived, will not entitle him to realise damages from his promisor or indemnifier. Any suit therefore brought before the actual loss has accrued, is liable

Contract Act—(Contd.)

to be dismissed as premature. (*Din Mohammed J.*)

SHAM SUNDAR vs. CHANDU LAL.

38 P.L.R. 116 = 159 I.C. 853.

Sec. 134—Contract of guarantee executed in favour of Court—stipulation for enforcement by creditor—Sec. 134, if applies.

Sec. 134, Contract Act, presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. Therefore where there were no contracts between the sureties and creditor, and security bonds were executed by the sureties at the instance of the debtor and in pursuance of the orders of the Court granting stay, *held*, that the creditors were not party to the contract of guarantee even though they were empowered under the security bond to enforce and therefore Sec. 134, Contract Act, had no application to the case. (*Niamat-ullah & Collister JJ.*)

JANG BAHADUR SINGH & ORS. vs. BASDEO SINGH & ORS.

1936 A.L.J. 860 = 1936 A.W.R. 793 = A.I.R. 1936 All. 549 164 I.C. 248.

Secs. 134 & 137—Remedy against principal debtor allowed to be barred—Surety if discharged.

Allowing the remedy of the creditor to be barred against the principal debtor does not discharge the surety; the creditor can still proceed against the surety. (*R. C. Mitter J.*)

BIRENDRAJIT SAHA & ORS. vs. RENU-PADA SAHA.

40 C.W.N. 465.

Sec. 145—Surety not paying amount due by principal debtor to creditor but merely executing bond for its payment—Suit by surety against principal debtor for recovery of the amount, if maintainable.

Contract Act—(Contd.)

The payment which gives the surety a right of action against the principal debtor must be a payment of money or money's worth. Where, therefore, a surety sues the principal debtor for recovery of the amount due by the principal debtor to the creditor, but it appears that the surety has not actually paid the amount due by the principal debtor to the creditor but has merely executed a bond for its payment, the suit by the surety against the principal debtor is premature for he has no cause of action until he pays the amount due under the bond. 26 Mad. 522 relied on. (*Dunkley J.*)

MUTUSWAMY vs. K. KAYAMBOO KONAR.

14 Rang. 511 = A.I.R. 1936 Rang. 235 = 163 I.C. 668.

Secs. 148 & 151—*Silver entrusted to goldsmith stolen from his shop—Carelessness or negligence not proved—Liability of the goldsmith.*

The plaintiff entrusted to the defendant, a goldsmith, some silver and cash for the purpose of making ornaments. The silver was lost by theft but it was found that the defendant was not guilty of any carelessness or negligence. In a suit for recovery of the price of the silver in question, held, that the contract between the parties was one of bailment within the meaning of Sec. 148 Contract Act, and the goldsmith could not be made liable for the loss. (*Srivastava J.*)

SITLA BAKSHI SINGH vs. BAIJNATH.

1936 O.W.N. 334 = 161 I.C. 417 = A.I.R. 1936 Oudh 261

Sec. 178 (before amendment of 1930).—*Persons to whom goods entrusted for safe custody, if may make valid pledge thereof for own debt*

The word 'possession' in Sec. 178 of the Contract Act means unqualified possession. Therefore when a person who has been given possession of the goods of another for specified or limited purpose, for example,

Contract Act—(Contd.)

safe custody, delivers them to his creditor, by way of security, there is no valid pledge. (*R. C. Mitter J.*)

NANDRAM POKHARMAL AGARWALLA vs. MAULAVI HEDAYET ALI AHMED.

63 Cal. 508 = 40 C.W.N. 307 = 62 C.L.J. 394

Sec. 222—*Agent required to make good loss arising out of contract executing a Sarkat for the loss—Agent, if can recover the amount from the principal.*

An agent who enters into a contract with another person on behalf of his principal, and who being required to pay, the loss arising out of the transaction executes a Sarkat in favour of the other party undertaking to make good the loss, is entitled to recover the said loss from the principal under Sec. 222, Contract Act. (*Subhedar, A. J. C.*)

KODU SAO ONKAR LAL FIRM vs. SURAJMAL NARAINJI.

31 N.L.R. (Spp.) 154 = 161 I.C. 787 = A.I.R. 1936 Nag. 37.

Sec. 253 (5)—*Ex post facto confirmation of transaction, if permissible.*

Cl.(5) of Sec. 253 does not mean that an *ex post facto* confirmation can give validity to a transaction, initially invalid. The section presupposes that a decision was taken, the question having been raised and debated. (*Venkata Subba Rao & Cornish JJ.*)

MUDENUR NAGAPPA vs. (FIRM) BHAGVANJI KASAJI.

59 Mad. 1036 = 71 M.L.J. 378 = 1936 M.W.N. 716 = 43 M.L.W. 769 = A.I.R. 1936 Mad 593 = 164 I.C. 239.

CONTRIBUTION.

Contribution decree—appeal by some defendants—prayer by plaintiff that if appeal of any defendant granted the contribution from the other defendants, should be proportionately increased—increase if can be granted against defendant not a party to the appeal.

Contribution—(Contd.)

In appeals preferred by some of the defendants against a decree in a suit for contribution, the respondent made an application that if the appeal of any of the other defendants should be proportionately increased. *Held*, that the prayer could be granted only upon hearing all the defendants in the suit including those who had not appealed against the contribution decree and had not entered appearance in the appellate Court (*Fazl Ali & Luby JJ.*)

BISAMBHAR DEO NARYAN SINGH & ORS. vs. HIT NARAIN SINGH.

15 Pat. 219—16 P.L.T. 813=160 I.C.
976=A.I.R.1936 Pat. 49.

CO-OPERATIVE SOCIETIES ACT (II OF 1912.)

Secs. 23 & 42 (2) & (6)—Order by liquidator directing a past member to contribute, if can be questioned in a civil suit.

The plaintiff became a member of a Rural Credit Society in 1914, but resigned his membership and withdrew his share capital in 1919. The Society having subsequently gone into liquidation, the liquidator in the course of his proceedings passed an order directing the plaintiff to contribute Rs. 500. To avoid coercive process, the plaintiff paid the amount, and then brought a suit in the Civil Court for refund of the same. It was contended on behalf of the liquidator that no suit for recovery of the amount lay in the Civil Court by reason of Sec. 42 (6) of the Act. *Held*, that merely because the plaintiff was at one time a member of the Society, it could not be said that he had no right to ask the Civil Court to decide whether he was under any liability to contribute at all. 14 Lah. 703 followed. (*King & K. S. Menon JJ.*)

SAVKAR U VAIKUNTHA BHAT vs. K. SARVOTHAMA RAO.

59 Mad. 895=70 M.L.J. 604=1936
M.W.N. 407=34 M.L.W. 730=A.I.R.
1936 Mad 571.

Sec. 42 (6)—Suit for declaration that award made by arbitrators unenforceable, if may be entertained by the Civil Court.

Co Operative Societies Act—(Contd.)

The plaintiff sued for a declaration that an award made by an arbitrator regarding certain monetary transaction between the plaintiff and the defendant was ineffectual and unenforceable, and for an injunction restraining the defendant from proceeding with the execution of the said award. It was contended that in view of the provisions of the Co-operative Societies Act, the suit was not maintainable in the Civil Court. *Held* that the Civil Court had jurisdiction to entertain the suit. (*Agha Haidar J.*)

HIRA NAND & ORS. vs. THE ANJUMAN-IMDAD-I QARZA MAUSUMA SUNAR BANK.

38 P.L.R. 355=161 I.C. 248.

Sec. 43 (i)—Rules framed under the Act, r. 14 (5)—Tahsildar deputed by collector acting under r. 14 (5), if a Court.

A Collector acting under r. 14 (5) of the Statutory rules under the Co-operative Societies Act cannot be deemed to be a Court, and therefore a Tahsildar deputed by the Collector to act under the rule can not be said to be a Court. (*Cornish J.*)

ABDUL RAZACK SAHER vs. KILPATTI CO. OPERATIVE SOCIETY.

59 Mad. 257=70 M.L.J. 31=160 I.C.
520=A.I.R. 1936 Mad. 150=1936
M.W. N. 23=43 M.L.W. 58

CO-SHARER.

Co-sharer in exclusive possession of portion of a common property, if can be ejected therefrom by other co-sharers without proof of special damage.

If a co-sharer brings a portion of the common property practically under his exclusive possession, another co-sharer is entitled to eject him therefore, and it is not necessary for the latter to prove any special damage. 1 Lah. 249 & 2 Lah. 73 relied on. (*Bhide J.*)

MANGAT RAM vs. GHULAM HUSSAIN.

38 P.L.R. 679=163 I.C. 148.

Co-sharer in exclusive possession by consent of other co-owners—Procedure by which his possession can be disturbed.

Co-sharer—(Contd.)

Where a co-sharer is in possession of the whole or in part of a joint property by virtue of an arrangement with his co-owners or with their consent it will not be open to the other co-sharers to disturb him from possession of the same and if he is dispossessed the Court will certainly restore him to possession. Their remedy is by way of a suit for partition. 55 Cal. 653 relied on. (*Venkataramana Row J.*)

KOVUMMAL AMMAD vs. URATHKAN-DIYIL ARAGADAN AMMAD.

71 M.L.J. 145=163 I.C. 825=A.I.R. 1936 Mad 666=1936 M.W.N. 529=43 M.L.W.646.

Co-tenant authorised to sell property for one purpose selling it for another—sale, if vitiated.

One tenant in common cannot sell more than his share of the common property and any conveyance in excess thereof will not be binding on his co-tenants. But it is open to a tenant in common to authorise his co-tenant to sell his share of the property. Such authority may be express or implied. When such authority has been given, the fact that a purpose other than one intended by him is recited in the sale deed or that the co-tenant does not carry out the instructions given by him will not vitiate the sale. (*Venkataramana Rao J.*)

APPASAMY MUDALIAR & ORS. vs. SUNDARAM PILLAI & ORS.

71 M.M.L.J. 223=44 M.L.W. 205=1936 M.W.N. 907=164 I.C. 1078=A.I.R. 1936 Mad. 696.

Undivided property—Mortgage by one co sharer of property in his exclusive possession—Validity—Mortgage if subject to right of other co-sharers to enforce partition.

A co-sharer in an undivided property cannot execute a mortgage in respect of specific plot of Sir land even though he might have been in exclusive possession of the same by an agreement amongst the various co-sharers. If such a mortgage is made, the mortgage is subject to the right of the other co-sharers to enforce a partition. Accordingly, where a co-sharer in an undivided Mahal mortgages two specific

Co-sharer—(Contd.)

plots of Sir in his exclusive possession and the mortgagee obtains a preliminary decree followed by a final decree for sale on the basis of the mortgage, and subsequent to the final decree the two plots in question are allotted to another co-sharer at a perfect partition but the mortgagee decreeholder in pursuance of his decree puts the property to sale, purchases two plots and obtains mutation in his favour, the co-sharer to whom the plots are allotted, can successfully sue the mortgagee auction purchaser for possession of the plots in question. 7 All. 633, 24 All. 483 and 20 Cal. 533 relied upon. (*Bajpai J.*)

ADIT SINGH vs. RAI BINDAYAL SAHU & ORS.

1936 A.L.J. 630=1936 A.W.R. 543=163 I.C. 762=A.I.R. 1936 All. 456.

COSTS

Appellate Court's power to interfere.

Costs being in the discretion of the trial Court, the Appellate Court cannot interfere where there was material for the exercise of the discretion. (*Courtney Terrell v. J. & Dharle J.*)

SECRETARY OF STATE vs. LODNA COALIERY CO.

15 Pat. 510=17P.L.T 279=164 C. 860=A.I.R. 1936 Pat. 513.

Partition suit—Ordinary rule as to costs—defendant when may be made liable.

Ordinarily in a partition suit, pure and simple, the parties are to bear their own costs of the suit up to the stage of the preliminary decree, but when the defendant contests the plaintiff's right to claim partition, he may be made liable for costs incurred by reason of his unfounded opposition. An objection that on a proper construction of the Will of the last owner, there could be no partition of the property is not such an unfounded objection when there is a clause in the will apparently containing certain restrictions on partition. (*D. N. Mitter & Patterson J.J.*)

HAREY HAREY SINHA CHOWDRURY vs. HARI CHAITANYA SINHA CHOWDRURY.

40 C.W.N. 1237.

Costs—(Contd.)

Joint decree for costs against several persons—One judgment debtor satisfying entire decree—Other judgment debtors when liable to contribute.

A joint decree for costs against several judgment-debtors creates a joint debt on the part of the judgment-debtors in favour of the successful party and if any one of them is compelled to satisfy the whole, he is *prima facie* entitled to have contribution from his co-judgment-debtors unless the latter can show any ground for being relieved. (*R. C. Miller J.*)

KULADA PRASAD MITRA & ORS. vs. GIRIBALA DEBYA.

40 C.W.N. 1089.

COURT-FEE

Time granted to make up deficient court-fee—Date on which the Court fee must be deemed to have been paid.

Where time is granted to make up deficiency in Court-fee and the deficiency is made good within the time allowed, the document on which the Court-fee is so made up must be taken to date back to the date on which it was originally presented. 10 Lah. 737 followed. (*Tekchand & Dalip Singh, JJ.*)

NIHAL CHAND vs. DISTRICT BOARD, MIANWALI.

A.I.R. 1936 Lah. 564.

Review of judgment on appeal presented in forma pauperis—Court fee, if need be paid on application.

No Court fee is required to be paid on an application for review of judgment passed in an appeal which was presented in *forma pauperis*. 20 All. 410 followed. (*Guha & Bartley JJ.*)

SERAJGANJ CO-OPERATIVE URBAN BANK, LTD., & ANR. vs. BINDURASINI DASNYA & ORS.

40 C.W.N. 1047 = A.I.R. 1936 Cal. 752.

Sufficiency of court-fee challenged—Order by the Court if may be revised.

The High Court will not ordinarily interfere with inter-locutory order except in

Court-Fee—(Contd.)

exceptional circumstances when such order may result in irreparable injury to one or other of the litigant parties. An order to permit the suit to proceed does not injure any party. When a suit is allowed to proceed on an insufficient court-fee, it is not either of the litigant parties who suffers but the revenue. The Court-fee Act was passed not to arm the litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the estate. The High Court therefore will not at the instance of a party interfere with an order of the trial court allowing a suit to proceed on an insufficient court-fee. (*Agarwalla & Varma, JJ.*)

RAGHUNANDAN GIR vs. DEORAJ GIR.

15 Pat. 340 = A.I.R. 1936 Pat. 85 = 161 22 = 17 Pat. L.T. 9.

Court if can demand court-fee on the ground that plaintiff should have asked for consequential relief.

For the purpose of court-fee, the court must look to the plaint only. Court-fee cannot be demanded from a plaintiff on the ground that question of possession will arise in the suit. Though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form it is not open to the Court to say that the plaintiff should have asked for consequential relief and should have paid the proper fee as in such a suit. 3 Pat. 915 followed. (*Mohammad Noor & Varma JJ.*)

SITARAM SINHA vs. JOGENDRA NARAIN SINHA & ORS.

15 Pat 386 = A.I.R. 1936 Pat. 171 = 161 I.C. 706 = 17 Pat. L.T. 115.

COURT-FEE ACT (VII OF 1870.)

Sec. 7 & Sch. I. Art. 1—Appeal in which no amount claimed but liability of certain property for decretal amount disputed, how should be valued.

Where in an appeal against a mortgage decree, an appellant does not dispute the amount decreed but disputes only the liability of a certain property for the decretal amount, the value of the appeal for the

Court-Fee—(Contd.)

purpose of the court-fee, is under Art. I, Sch. I of the Court-fees Act, the value of such property, when such value is less than the amount decreed. When such value exceeds the amount decreed, the value of the appeal is the decretal amount. (*Addison & Abdul Raschid JJ.*)

FAZL AHMED vs. TOLARAM SINGH.

38 P.L.R. 12=162 I.C. 729=AIR, 1936
Lab. 17.

Sec. 7 (iv) (a) & Sch. II, Art 17 A
Suit by a minor to declare decree in his absence a nullity—Court-fee payable.

If a party to a decree sues to set aside or cancel the decree, Sec. 7 (iv-A), Court fees Act, governs the Court fee, but if the party suing was not a party to the decree which he seeks to have declared not binding on him, the appropriate provision of the Court Fees Act is Art. 17 A. Where therefore the plaintiff sued for a declaration that a *razinama* decree passed against the members of a tarwa, of which the plaintiff and defendants were members—the plaintiff then being a minor represented by the defendant—may be declared null and void and the plaintiff paid court fee in accordance with Art. 17 A, *held*, that the court fee paid was proper and the plaintiff was not liable to pay court fee under Sec. 7 (iv) A, of the Court Fees Act. (*Cornish J.*)

MANAKKAT TEEKEPEEDIKAIYL KOOLLEVI NADUVILE PURAYIL ABDULLA vs. SUBRAMANYAN PATTAR.

71 M.L.J. 383=43 M.L.W. 715.

Sec. 7 (iv) (a), (iv) (c) & Schedule II, Art. 17A—Suit to declare right by survivorship to the properties left by a member of a joint family on declaration of Will of deceased to be forgery—Claim for possession to properties—Relief regarding recognition of discharged of promissory note—Court-fee payable.

The plaintiff sued the wife and daughter of a deceased person for possession of the properties left by the latter on a declaration that a will left by the de-

Court-Fee Act—(Contd.)

ceased was a forgery and that the plaintiff was entitled to succeed to the properties by right of survivorship. The plaintiff further claimed that a promissory note executed by him in favour of the deceased had been discharged and he was entitled to receive back certain documents which he had given by way of security. *Held*, that neither Sec. 7 (iv) (a) nor Sec. 7 (iv) (a) applied to the case for the purpose of court-fee. The plaint was leviable to court-fee as for a mere declaration under Art. 17A of Schedule II of the Court-fees Act as amended in Madras. (*Beasley C. J.*)

ATHMARAM CHETTIAR vs. SARASWATHI AMMAL & ORS.

70 M.L.J. 542=43 M.L.W. 696=1936
M.W.N. 475=163 I.C. 837=A.I.R.
1936 Mad. 344.

Sec. 7 (iv) (a) (ix) & (x)—Suit for recovery of mortgage bond with an endorsement of full satisfaction—Court fee payable.

A suit by a mortgagor for recovery of a mortgage bond with an endorsement of full satisfaction is in substance a suit for redemption, and *advalorem* court fee has to be paid on the sum borrowed. Such a suit is not one for specific performance of a contract as contemplated under section 7, Cl. x of the Court Fees Act. (*R. C. Miller J.*)

MUHAMMAD ISHAK MIYA CHOWDHURY vs. ANANDA CHANDRA SAHA.

63 Cal. 637=40 C.W.N. 90=162 C.L.J.
405=164 I.C. 1042.

Sec. 7 (iv) (b) (c), (iv) A (v)—Suit by sons for declaring a sale deed by their father invalid and for partition and possession—court fee payable.

The plaintiffs who were two brothers instituted a suit against their step brothers and stepmother for a declaration that the suit properties were the undivided ancestral properties by their father to their step mother was invalid having been effected without consideration for the purpose of depriving the plaintiffs of the benefit of the same in a partition between them and their father. The plaintiffs further prayed for a partition of their shares by metes and

Court-Fees Act—(Contd.)

bounds and for separate possession thereof. *Held*, that for purposes of Court fee, the suit fell under cl. (v) of Sec 7, of the Court Fees Act, and not under cl. (iv), sub-cl. (b) or (c), nor under cl. (iv-a) of the Act. (*Varadachariar J.*)

SELLAMMAL vs. JOTHIMANI NADAR.

70 M.L.J. 398=161 I.C. 679=1936
M.W.N. 148=A.I.R. 1936 Mad 411.

Sec 7 (iv) (c)—*Suit for declaration that lambardar bound to receive land revenue from plaintiff and for injunction—Court-fee payable.*

A suit for a declaration that the defendant lambardar could not refuse to accept land revenue from the plaintiffs for the land of which they were occupancy tenants and for a permanent injunction against the defendant compelling him to receive such land revenue from the plaintiffs and not the landlord, is a suit for declaration with consequential relief within the meaning of Sec. 7 (iv) (c), Court-fees Act and is therefore liable to pay court-fees ad-valorem. Where, however, the plaintiffs treat the suit as one for mere declaration but gives a particular valuation of the suit for the purposes of jurisdiction, that value will also be the valuation of the suit for the purposes of court-fee, and the plaintiffs cannot be allowed to reduce that value. 8 Lah. 531 & 38 P. L. R. 349 relied on. (*Addison & Abdul Rashid. JJ.*)

SUNDAR SING & RAJINDRA SING & ANB.

38 P.L.R. 688=163 I.C. 227.

Sec. 7 (iv) (c), Proviso (as amended by Madras Act V of 1922)—*Suit for declaration of a right to get water free of irrigation cess and for refund of cess paid—Court fee payable.*

The plaintiff brought a suit for a declaration that in respect of certain lands in his holding, he had a right to take water from the river free of irrigation cess. He also prayed for refund of an amount illegally levied from him on account of such cess. The trial Court held that the plaintiff was bound to pay Court fee under Sec. 7 (iv) (c) of the Court Fees Act read along with the proviso added to that clause by Madras Act V of 1922. *Held*, that the plaintiff was

Court-Fees Act—(Contd.)

not suing for a declaration in respect of a right of easement, but was merely asking for an immunity from assessment, and the consequential relief did not relate to any immovable property, but was only a claim for recovery of money. Therefore, the proviso added by Madras Act V of 1922 was not applicable to the case, (*Varadachariar J.*)

GURUNATHA CHETTIAR vs. SECRETARY OF STATE.

59 Mad. 962=70 M.L.J. 625=1936
M.W.N. 115=43 M.L.W. 192=160 I.C.
939 A.I.R. 1936 Mad. 201.

Sec. 7 (iv) (c) & Sch. II, Art. 17 (iii)—*Suit by minor son for declaration that mortgage decree and sale are invalid and not binding on him—Court-fees payable.*

A suit by a minor for a declaration that a mortgage decree obtained against his father and a sale of the properties in suit in execution of the said decree, are invalid, and as such not binding on his interest involves a consequential relief, and is governed by Sec. 7 (iv) (c), Court-fees Act. The fact that the minor had not been personally impleaded in the suit on the mortgage against his father does not make any difference. 51 Bom. 450, 8 Pat 728 referred to. (*Addison & Beckett JJ.*)

SOHINDAR SINGH vs. SANKER DAS.

A.I.R. 1936 Lah. 166.

Sec. 7 (iv) (c) & Sch. II, Art. 17 (iii)—*Suit to set aside decree declaring annual maintenance charge upon property—Court fee payable.*

In a suit for a declaration that a certain property is not subject to the payment of a maintenance imposed by a decree declaring maintenance to be charged upon the property, where no consequential relief is expressly prayed for by the plaintiff, the Court-fee is payable under Art. 17 (iii) of the 2nd Schedule to the Court-fees Act. For the purpose of fixing the amount of court-fee in a suit of this kind, the language of the plaint should be primarily looked to. (*King C. J. & Ndinavutti, J.*)

BANK OF UPPER INDIA vs. ABDUL ALI.
1936 O.W.N. 522=A.I.R. 1936 Oudh.
317=162 I.C. 750.

Court-fees Act—(Contd.)

Sec. 7 (iv) (b).—*Suit for dissolution of partnership and settlement of accounts—court-fee required to be paid.*

In a suit for dissolution of partnership and settlement of accounts, it is not necessary for the plaintiff who had provided all the capital for the business of the firm to pay a court fee stamp on the whole amount which he claims should be taken into account in adjusting the final accounts between the parties. It is open to him to value his relief for the purpose of court fee stamp tentatively at such figure as he may choose to fix under Sec. 7 (iv), Court Fees Act. (*Jailal & Sale JJ*)

TARIF SINGH vs. KANSHI RAM.

160 I.C. 642 = A.I.R. 1936 Lah. 458.

Sec. 7 (v), Cl. (e).—*Suit for possession of garden, if comes under Sec. 7 (V), Cl. (e).*

For the purpose of computing the valuation of land, the subject matter of a suit for possession, the legislature has drawn a distinction between the case where the subject matter is a house or a garden. If it is a garden, it will come under Cl. (e) of Sub Sec. 5, Sec. 7, Court-Fees Act, and the Court fee will have to be paid on the market value of the garden and not on the basis of the annual revenue of the land. (*R. C. Mitter JJ*)

JOGENDRA NATH DAS vs. SARUP CHAND & HUKUM CHAND FIRM.

A.I.R. 1936 Cal. 264 = 162 I.C. 810.

Sec. 12 (iii).—*Power of appellate court to require payment of the entire deficit court fees on plaint.*

A court of appeal is competent under Sec. 12 (ii) of the Court Fees Act to require that a party who is liable to pay court fees should pay the entire deficit court fees on the plaint, even though the appeal before it is with regard to only a portion of the claim. (*D. N. Mitter & Patterson JJ.*)

RADHARANI DASSI vs. KSHETRA MOHAN CHAKRAVERTY.

63 Cal. 720 = 40 C.W.N. 406.

Court-fees Act—(Contd.)

Secs. 12(ii) & 28.—*Written statement claiming set off not stamped—Court accepting same but directing payment of proper Court-fees—Court-fee not paid—High Court, if can direct realisation of court-fee.*

A written statement claiming a set off was accepted by the trial court through mistake or inadvertence although not stamped. The trial judge subsequently directed the party to pay court-fees but the same was not realised in the trial court. *Held*, that the High Court could, in second appeal, under Sec. 12 (ii), Court-fees Act & Sec. 149, C. P. Code, direct the appellant to pay the court-fees not paid in the trial court. 10Lah. 747 relied on. (*Nasim Ali & Henderson JJ.*)

JITENDRA NATH ROY vs. GNANADA KANTA DAS GUPTA.

A.I.R. 1936 Cal. 277.

Sec. 17.—*Suit on several mortgage bonds—Court fees payable.*

Although Sec. 67A of the T.P. Act requires that in the case of a mortgagee holding several mortgages in respect of all of which the mortgage money has become due, he must bring one suit, yet the provisions of that section cannot affect in any way the provisions of Sec. 17 of the Court Fees Act. Under that section, the proper court fee to be paid on a plaint in a suit to enforce several mortgage bonds, by which different properties are hypothecated, is not on the aggregate amount of the claim but the total of the fees payable separately on the sums claimed in respect of each of the bonds. (*D. N. Mitter and Patterson JJ.*)

RADHARANI DASI vs. KSHETRA MOHAN CHAKRAVERTY.

63 Cal. 720 = 40 C.W.N. 406.

Sec. 17.—*Suit for recovery of amount due in respect of dealings—cost of sending notice of demand, if constitutes a separate and distinct subject from the items relating to the dealings.*

The plaint in a suit for recovery of the amount due in respect of dealings set out

Court fees Act—(Contd.)

the amounts due in respect of the dealings and the cost incurred for sending notices of demand. *Held*, that the item relating to the cost of sending notices of demand was not a separate or distinct subject from the items relating to the dealings within the meaning of Sec. 17 of the Court Fees Act, and that the valuation of the suit as if the claim related to one subject only was correct. (*Beasley C. J. & Stodart J.*)

R. R. GOPALCHARI, IN RE.

59 Mad. 739 = 1936 M.W.N. 243 = 43 M.L.W. 362 = 70 M.L.J. 306 = A.I.R. 1936 Mad. 420.

Sec. 19 (xvii)—*Application by prisoner that opposite parties be convicted, if falls within Sec 19 (xvii).*

Cl. (xvii) of Sec. 19 of the Court-fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. Where a prisoner applies that an order of acquittal be set aside and the opposite parties convicted and sentenced according to law, the application does not fall within Sec. 19, Cl. (xvii) and is not exempt from stamp fees. (*Harris, J.*)

MOTI PANSARI vs. USMAN SHEIK.

1936 A.L.J. 453 = 1935 A.W.R. 215 = 162 I.C. 296 = 37 Cr.L.J. 586 = 1936 Cr.C. 484 = A.I.R. 1936 All. 318.

Sch. 1, Art. 1—*Suit for possession—Appeal by defendant—Court-fee payable.*

Where in a suit for possession the defendant claims to be in possession of the property in dispute as mutwali under a wakf-muna, but the trial court finds the wakf invalid and decrees the suit, in an appeal by the defendant for setting aside the decree, ad valorem court-fee should be paid under Sch. 1, Art. 1, Court-fees Act. 1935 A. W. R. 196 & 56 Cal. 188 distinguished. (*Bonnet J.*)

RASHIDA KHATUN vs. FAIVAZ BIBI.

1936 A.L.J. 514 = 1936 A.W.R. 341 A.I.R. 1936 All. 216 = 159 I.C. 727

Court fees Act—(Contd.)

Sch. 1, Art. 1—*Mortgage suit—Court finding deft. to be a non-agriculturist—Dft. appealing against such contention—Court-fee payable.*

In a mortgage suit, a plea was taken by the defendant that he was an agriculturist, but the Court overruled the objection and passed a decree against him. Thereupon the defendant appealed against the decision praying that he be declared an agriculturist. He paid a court-fee stamp of Rs. 10 only on the appeal. *Held*, that the defendant was not entitled to appeal for the purpose of merely getting rid of a finding of a trial Court which did not suit him. He could only appeal against the decree and was liable to pay a court-fee stamp under Art. 1 of Sch. I, Court-fees Act. (*Addison & Abdul Rashid J.J.*)

FAZL AHMAD vs. TOLA RAM SING.

A.I.R. 1936 Lah. 179 = 162 I.C. 729 = 35 P.L.R. 12.

Sch. 1, Art. 1—*Suit for declaration that property entered in mortgage deeds be declared to be the property of the Math and mortgagees be declared to have no right to sell the property—Court-fee payable.*

In a suit on the basis of two mortgages, a certain person applied to be made a party defendant in the suit on the ground that the Mohunt who had executed the mortgages had initiated him as a disciple and nominated him as his successor and he had accordingly a right to protect the property. The application having been disallowed he instituted a suit for a declaration that the property entered in the mortgage deeds concerned be declared to be the property of the Math and not transferable and that the mortgagees be declared to have no right to have the property sold by auction. *Held*, that the plaintiff was not strictly speaking asking for any declaration as to his own legal character or as to his own right to the property in question; he sought in effect to have the mortgage deed in question adjudged void and the relief claimed in the suit must therefore be regarded as coming within the scope of Sec. 39 and not, Sec. 42, Specific Relief Act. An ad valorem court-fee was therefore payable on the valuation stated in the plaint.

Court-fees Act—(Contd.)

1932 A. L. J. 681 applied. (*Bennet & Smith JJ.*)

GOSHAIN MOHESHER GIR vs. SHIKH RAHMATULLAH.

1936 A.L.J. 798.

Sch. 1, Art 12—*Succession certificate—court-fee to be paid according to the Act in force at the time when succession certificate comes into existence.*

In the case of Succession Certificate, the relevant date for calculating the amount of court-fees is not the date when the application for the issue of the certificate is made. It is either the date when the certificate is drawn up or perhaps the date when the Court passes an order that such certificate should be drawn up. Accordingly, the amount of fee payable should be calculated according to the Court-fees Act, which is in force on the date when the certificate comes into existence, 52 Bom. 61 & A.I.R. 1924 Cal. 987 referred. (*Allsop & Ganganath JJ.*)

GURCHARAN PROSAD vs. SECRETARY OF STATE FOR INDIA.

1936 A.W.R. 111 = 161 I.C. 209 = 1936 A.L.J. 55 = A.I.R. 1936 All. 309.

Sch. II, Art 1—*Application under O. 21 r. 63 (a), C. P. Code—Court-fee payable.*

An application by a decree-holder under O. 21 r. 63 (a) C. P. Code framed by the Lahore High Court for an enquiry into the indebtedness of certain persons to the judgment-debtor and directing them to pay the money in Court is an application under Sec. 47, C. P. Code and should be stamped as such with a court-fee of Rs. 1. An *advalem* court-fee is not required. (*Jailal, J.*)

CHANDIGRAM vs. JANKIDAS.

38 P.L.R. 191.

Sch. II, Art. 1, cl. (d)—*Court-fee, payable on memorandum of objection under Or. 41, r. 26, C. P. Code.*

An objection filed under Or. 41, r. 26 C. P. Code, not being an application or petition within the meaning of Art. 1, cl. (d) of

Court-fees Act—(Contd.)

Sch. 2 of the Court-fees Act, no court-fee is payable on the memorandum of objection. (*Srivastava & Zia-Ul-Hasan JJ.*)

SITARAM vs. SUKHAJ.

1936 O.W.N. 113 = 160 I.C. 38(1) = A.I.R. 1936 Oudh 180.

Sch II, Art. 17—*Suit under the Santal Parganas Settlement Regulation for declaration that record-of-rights is wrong as it omits plaintiff's name and extent of share in the estate—Court-fee payable.*

A suit under Sec. 25(a), Santal Parganas Settlement Regulation for a declaration that the decision of the settlement officer on the objections of the plaintiff for recording his name is wrong and that the entries in the record-of-rights about the proprietary rights in the estate are incorrect by reason of the fact that the plaintiff's one-fourth share is not recorded therein, is governed by Art. 17 (i)(iii) of Sch. II. of the Court-fees Act, such a suit being simple one asking for a declaration that the record-of-rights is wrong. The fact that the plaintiff's name has not been recorded by the settlement officer is no ground for holding that he must sue for possession. (*Mohammad Noor & Varma JJ.*)

SITARAM SINHA vs. JOGENDRA NARAIN SINHA.

15 Pat. 386 = A.I.R. 1936 Pat 171 = 161 I.C. 706 = 17 P.L.T. 113.

Sch. II, Art. 17 (i) & (ii)—*Suit for declaration that entry in record of rights about proprietary shares of an estate are wrong—court fee payable.*

In a suit under Sec. 25A, Santhal Parganas Settlement Regulation, 1872, for a declaration that the decision of the Settlement Officer on the plaintiff's objection for recording his name was wrong and that the entries in record of rights about the proprietary shares of the estate were incorrect, the plaintiff paid a court fee of Rs. 15 only. The trial court held that the plaintiff not being a zamindar within the meaning of Sec. 25A of the Santal Parganas Settlement Regulation, by reason of the fact that his name had not been recorded in the record of rights, his suit was one for recovery of

Courts-fees Act—(Contd.)

possession, and therefore the Court fee paid was insufficient. *Held*, that the fact whether the plaintiff was or was not in possession, and therefore was or was not entitled to claim a declaration was a matter to be decided in the trial of the suit. For purposes of the Court fee, the Court had to look to the plaint only. Court fee could not be demanded from the plaintiff on the ground that question of possession would arise in the suit. (*Khaja Mohammad Noor & Varma JJ.*)

SITAHAM SINHA vs. JOGENDRA NARAYAN SINHA.

17 P.L.T. 115 = 15 Pat. 386 = 161 I.C. 706 = A.I.R. 1936 Pat. 171.

Sch. II, Art. 17(vi)—Partition suit—Appellant seeking to reduce amount of certain charge—Liability to pay court-fee.

The provisions of Sch. 2, Art. 17 (vi), Courts-fees Act, apply when it is impossible to value the subject matter in dispute in the appellate court. Where the appellant in a claim for partition seeks to lessen the amount of a certain charge on the properties which he claims on partition, he is liable to pay court-fees on the sum for which he seeks to escape liability. (*Niamatullah & Allsop JJ.*)

RAMPRÔSAD vs. KRISHNANAND SINGH SHAILA.

1936 A.W.R. 340 = A.I.R. 1936 All. 221 = 159 I.C. 802 = 1936 A.L.J. 513.

Sch. II, Art. 171—Appeal from an order refusing to grant future interest—Court-fee payable.

In an appeal questioning the decision of the District Judge for failing to grant future interests, a fixed court-fee on Rs. 100 should be paid, because the amount of future interests cannot be determined as it depends upon the date of payment by judgment-debtor of the amount decreed. (*Jailal J.*)

BODA RAM vs. JOINT HINDU FAMILY OF DEBIDAS HARICHARAG.

38 P.L.R. 276 = 163 I.C. 928 = A.I.R. 1936 Lah. 668.

COURT OF WARDS ACT.

Sec. 55—Collector suing on behalf of minor—benefit of Sec. 6, if can be claimed.

The Collector as manager of the Court of Wards of the estate of minors, can bring a suit on behalf of the minors, in which the minors can obtain the benefit of Sec. 6 of the Limitation Act. (*Bennet, J.*)

RAMESH CHANDRH vs. KASHI RAM BRAJAN LAL

1936 A.L.J. 59 = 1936 A.W.R. 99 = 161 I.C. 330 = A.I.R. 1936 All. 152.

CUSTOM.

When it amounts to law.

A custom must be proved to be ancient and invariable by clear, consistent and cogent evidence, in order that it may have the effect of law. (*Nyogi & Subhedar A. J. C.*)

YADGAR HUSSAIN vs. MAHAMMAD EBRAHIM RAZAK.

31 N.L.R. (Supp.) 202 = A.I.R. 1936 Nag. 71 = 163 I.C. 179.

Proof of a custom.

A custom can be properly proved by general evidence given by the members of the family or the tribe amongst whom such custom is alleged to be prevalent, without proof of special instance. 6 Lah. 502 and 10 Lah. 56 relied on. (*Bhide & Currie JJ.*)

SOHAN SINGH vs. Mst. NARAINI.

A.I.R. 1936 Lah. 540.

Burden of proving particular custom.

It lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is governed by custom and not by personal law, and further to prove what that particular custom is. (*Bhide & Currie JJ.*)

SOHAN SINGH vs. Mst. NARAINI

A.I.R. 1936 Lah. 540.

Custom when may be introduced into the law without proof in each individual case.

Custom—(Contd.)

Where a custom is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. 23 C. W. N. 173 relied on. (*Derbyshire C. J. & R. C. Mitter J.*)

HEMENDRA NATH ROY CHOUDHURY
vs. JNANENDRA PROSONNA BHADHURI.

63 Cal. 255 = 40 C.W.N. 115 = 159 I.C. 1101.

Custom recognised in series of cases—proof by oral evidence in each case, if necessary.

A custom that has been repeatedly brought to the notice of the Courts and has been recognised by them regularly in a series of cases attains the force of law, and it is no longer necessary to assert and prove it in each case by oral evidence. (*Harris & Ganga Nath J.J.*)

BANARSI DAS vs. SUMAT PRASAD.

1936 A.W.R. 857 = 1936 A.L.J. 1237 = A.I.R. 196 All. 641 = 164 I.C. 1047

Ante adoption agreement conferring life estate on mother, if valid,

An ante adoption agreement conferring a life estate or the adoptive mother is valid where there is a custom to support it. (*Derbyshire C. J. & R. C. Mitter J.*)

HEMENDRA NATH ROY CHOWDHURY
vs. JNANENDRA PROSONNA BHADHURI.

63 Cal. 155 = 40 C.W.N. 115 = 155 I.C. 1101.

Decision on custom—value of,

A decision on custom is not a final decision. It only becomes a relevant instance under Sec. 13, Evidence Act that such a right has been asserted and recognised. It is always necessary to assert and prove what the custom is. (*Addison A. C. J. & Din Mohammad J.*)

NARAIN SINGH vs. MALLIK AHMED
YAR KHAN

17 Lah. 133 = 38 P.L.R. 472 = 162 I.C. 374 = A.I.R. 1936 Lah. 21.

DEBTOR & CREDITOR.

Suit on a simple loan—Creditor, if bound to enquire how the loan is spent.

In the case of a simple loan where the power of the debtor is not subject to any limitations, considerations regarding the character and habits of the debtor are quite foreign to the issues involved. The creditor is not bound to see how the loan is spent, or whether it is wanted for the due necessities of life. The debtor on the other hand is bound to repay the money actually borrowed by him whether he squanders it in debauchery or expends it on charity. The only simple issue involved in such cases, is whether, when execution is admitted or proved there is any material on the record to show that no consideration had passed. (*Addison & Din Mohammad J.J.*)

BANNU MAL vs. MUNSHI RAM.

17 Lah. 107 = 38 P.L.R. 552.

Bona fide assignment by debtor of his entire property to trustees for benefit of creditors—Effect of.

Arrangements by which a debtor bona fide assigns his entire property to trustees for the benefit of his creditors have the effect of divesting the debtor of any interest in the property so assigned, so that the property cannot be the subject of an attachment issued subsequently at the instance of a creditor who has obtained a decree upon his debt. It is not necessary that all the creditors should assent to the composition. A creditor who does not assent to the assignment can sue the debtor but cannot proceed against the property which under the deed has vested in trustees. (*Allsop & Bajpai J.J.*)

GOBIND RAM vs. KASHINATH.

1936 A.L.J. 350 = A.I.R. 1936 All. 239.

Debtor sending Hawla (hundi) to creditor asking him to present it to his own debtor and to take payment from him of amount due—Creditor by laches not presenting Hawla, if can recover the amount of debt.

A debtor in order to pay his creditor sent to him a *hawla* (form of *hundi*) asking him to present it to a person who was

Debtor & Creditor—(Contd.)

indebted to the debtor and to take payment of the amount from him. The debtor at the same time called upon his debtor to meet the *hawla* on presentation. The creditor, however, failed to present it for payment in due time and when he presented the same, the person to whom it was to be presented had become insolvent and the creditor was unable to realise his dues. *Held*, that the creditor was not entitled to proceed against his debtor as the *hawla* operated as satisfaction of the debt. (*Page C. J. & Mya Bu J.*)

HASAN ALI ISMAILJI vs. ABDUL RAMAN HAJI NUR MAHAMMAD.

A.I.R. 1936 Rang. 164 = 161 I.C. 791.

Accounts settled between debtor and creditor, if can be reopened.

Where accounts have been settled and agreed upon between two parties, and one party has promised to pay, a suit can be filed on the promise. A settled account gives rise to a cause of action, and the plaintiff need not prove that the balance found was correct provided it was accepted as correct by the defendant. A settled account cannot be reopened except on specific allegations of fraud or mistake. (*Tekchand & Abdul Raschid JJ.*)

PREMDAS RADHAKRISHNAN vs. MOHAMED HUSSAIN KHAN.

A.I.R. 1976 Lah. 51 = 162 I.C. 882(2).

Interest—Compound interest at 24 per cent, if excessive.

Although simple interest at the rate of 24 per cent. per annum may not be too high, but if it is compounded over three months, the rate becomes excessive and is liable to be reduced. (*M. C. Ghose J.*)

YEAJUDDIN PARAMANICK vs. RUP MUNJARI DAS.

A.I.R. 1936 Cal. 326.

Compound interest, when penal.

Though compound interest in itself is legal, such interest at a rate exceeding that

Debtor & Creditor—(Contd.)

on the principal sum, may well be regarded as in the nature of a penalty. (*Sir Shadi Lal.*)

KANDUKARI VENKATA HANUMANTHA BHUSANA RAO GARU vs. GADE SURAYYA.

41 C.W.N. 18 = 1936 O.W.N. 707 = 164 I.C. 27 = A.I.R. 1936 P.C. 283.

DECREE.

Prior decree substituted by subsequent decree, if can be executed.

Where a decree is substituted by another decree, the former cannot be executed. But where the effect of the latter decree is simply to substitute one decree-holder for the rest, the former decree cannot be executed. (*Skemp J.*)

DURGA DEVI vs. DR. MATHRA DAS.

38 P.L.R. 550.

Formal defect in the appointment of a guardian-ad-litem—Effect of:

There is no distinction of substance between setting aside a decree and declaring it null and void; and when the defect in the appointment of a guardian-ad-litem is not inherent but purely a formal one, as for example, where the mother of the minors was appointed guardian-ad-litem without her express consent as required by law—the minors cannot be held not to have been parties to the suit at all. (*Guth & Bartley, JJ.*)

MONMOHINI DAS PURKAYASTHA vs. BENARI LAL SAHA.

40 C.W.N. 1135 = A.I.R. 1936 Cal 421.

Dismissal of suit in default after preliminary decree—legality of—effect of such dismissal.

Once a preliminary decree has been passed in a suit, the suit cannot be dismissed in default, and an order of dismissal would be illegal. But when such an order is made, it cannot, even though illegal, be ignored either by that Court or by any other Court, nor can any further proceedings be taken, unless and until such

Decree—(Contd.)

order is set aside in due course of law, that is to say, either by review or by an application to set aside the dismissal in default or by an appeal or revision. (*Jailal J.*)

KIRPAL SINGH vs DALIP SINGH.

162 I.C. 412 = A.I.R. 1936 Lah. 875.

Death of mortgagor after preliminary mortgage decree—final decree passed without an order for substitution, if a nullity—suit to set aside the null decree, if maintainable.

A final decree in a mortgage suit against a defendant who has died after the passing of the preliminary decree is invalid, and a sale held in execution of such a decree is liable to be set aside. In such a case the legal representatives of the deceased mortgagor, can bring a separate suit questioning the validity of the decree. The fact that an administrator *pendente lite* had been appointed prior to the sale of the property by the Court cannot affect the right of the legal representatives to bring a separate suit. (*Panckridge J.*)

ABDUL RARIM vs. EZEKIEL.

63 Cal. 472.

Construction—Property attached before judgment—Parties subsequently agreeing that attachment was to continue in case of default in payment—Charge, if any, created on property in dispute on default taking place.

A decree-holder attached before judgment the property of the judgment-debtor. Subsequently there was a compromise whereby the judgment-debtor was to pay a certain sum to the decree-holder and it was provided that the attachment was to continue in case of default. The default having taken place it was contended that a charge had been created on the property in dispute. *Held*, that the clause in the deed providing for the continuation of the attachment was inserted in order to keep the attachment before judgment effective and could not create a charge on the

Decree—(Contd.)

property in dispute. (*Addison & Abdul Rashid JJ.*)

BASANTI DEBI vs. OFFICIAL RECEIVER
ESTATE OF GHULAM RASUL

A I.R. 1936 Lah. 619 = 164 I.C. 940.

Application for review of judgment dismissed—High Court ordering the application to be treated as an application setting aside ex parte decree, on applicant depositing decretal amount in Court—High Court if can extend period for making deposit.

An application for review of judgment which was so framed that it might in the alternative be treated as an application for setting aside an ex parte decree was rejected by the Lower Court and the applicant obtained an order from the High Court that the application be treated as an application for setting aside an ex parte decree on condition that the applicant should deposit in the Court below the full decretal amount within the period allowed, due to the fact that the record from the High Court was not returned to the Court below. In an application for extension of time for deposit of the amount, *held*, that the period allowed by the High Court for making the deposit was not an essential part of the decree and the High Court could extend the period for making the deposit. (*Allsop J.*)

KHIALI RAM vs. RUCHA RAM.

1936 A.W.R. 220 = 162 I.C. 909 = A.I.R. 1936 All. 371.

Transfer of a decree for execution—power of executing court to determine validity of transfer.

Whether the transfer of a decree can or cannot be properly made is a question for the transferring Court to decide, and when once a decree has been transferred, it is not open to the transferee Court to determine the correctness or the propriety of the order authorising such transfer, even where the subject matter of the decree is exempt from the jurisdiction of the executing Court. The remedy of the aggrieved party is by

Decree—(Contd.)

way of appeal from the order of the transferring Court. (*McNair J.*)

JYOTSWAR BANERJEE vs. SURENDRA NATH GHOSH.

185 I.C. 825 = 40 C.W.N. 267.

DEED.

Construction—Cardinal rule of interpretation.

The cardinal rule of interpretation for deeds as well as other instruments is to gather the intention from the words, to take into consideration the language of the entire deed, and to adopt an interpretation which gives effect, if possible, to all the parts and does not reject any of them. (*Sir Shadi Lal*)

PURNANANTHACHI vs. T. S. GOPALA-SWAMI ODAYAR.

63 I.A. 436 = 41 C.W.N. 14 = 64 C.L.J. 147 = 38 Bom. L.R. 1247 = 1936 A.W.R. 1089 = 1936 A.L.J. 1094 = 71 M.L.J. 554 = 44 M.L.W. 422 = 17 P.L.T. 910 = 1936 O.W.N. 709 = A.I.R. 1936 P.C. 28 = 164 I.C. 26

Construction—Ordinary rules of construction.

The ordinary rules of construction are that the document must be looked at as a whole and the intention of the parties is to be gathered not by speculating but by reference to the language used and the object of the agreement. In construing documents in the vernacular, it is not safe to rely upon English precedents. (*Dhavl & Agarwalla JJ.*)

PANCHAM SINGH vs. PROMOTHO NATH MITRA.

15 Pat. 630 = 17 P.L.T. 554 = A.I.R. 1936 450 = 164 I.C. 358.

Construction—principles of English cases, if proper guide in constructing language of ordinary Indians.

The applicability of many of the rules of construction depends on the habits of thought and modes of expression prevalent among those languages they are applied.

Deed—(Contd.)

Where therefore, the parties were South Indian Hindus of the ordinary class and their intention as to the terms of a compromise was to be ascertained from the language used in the decree, subject to the context and circumstances, held, that English cases afforded no guide. (*Lord Maugham*)

MURUGESAM PILLAI vs. MINAKHISUNDRA AMMAL.

63 I.A. 429 = 41 C.W.N. 22 = 38 Bom. L.R. 1233 = 17 P.L.T. 911 = 1936 O.W.N. 851 = 44 M.L.W. 579 = 71 M.L.J. 831 (P.C.) = 164 I.C. 337 = A.I.R. 1936 P.C. 309.

Construction—Obscure document—interpretation of.

In construing an obscure document where each party is trying to put his own interpretation upon it, the Court should put that interpretation upon it which would promote substantial justice and not deprive a party of what is justly due to him. (*Agha Haidar J.*)

RAM RAHAMAL vs. HAR NARAIN RAM CHAND.

38 P.L.R. 506 = 164 I.C. 50 = A.I.R. 1936 Lah. 587.

Construction—Agreement, how to be construed.

An agreement must be looked at as a whole, and for the purpose of understanding and interpreting the terms of any one clause, it is right and proper that the Court should look at the rest of the provisions of the instrument and construe the agreement as a whole. (*Costello & Panckridge JJ.*)

SHAMLAL SINGH vs. HIRU SINGH.

A.I.R. 1936 Cal. 472.

Construction—method for construing the terms of a contract.

In construing the terms of a contract, the decision should not turn on the magic of a particular word or words in one covenant; what matter may be reasonably supposed to be in the contemplation of the parties at the time of the contract is to be

Deed—(Contd.)

ascertained from a consideration of all the terms of the contract. (*Nasim Ali & Edgely JJ.*)

BENGAL COAL CO., LTD. vs. KISHORE LAL SINGH DEO.

40 C.W.N. 1118 = A.I.R. 1936 Cal. 459 = 165 62 I.C. 815.

Construction—Ambiguity in expression—Judge's power to decide by reference to questions of fact.

The mere fact that there was ambiguity or difficulty in the expression of a document does not entitle the Judge to consider the document by reference to questions of fact. (*Wort & Rowland JJ.*)

DARBAR SAHEB vs. BARELAL KANDARP NATH SHA DEO.

17 P.L.T. 488 = A.I.R. 1936 Pat. 275 = 162 I.C. 797.

Construction—"Bemiadi patta"—Meaning to be construed on consideration of other terms of lease.

A lease described as a "bemiadi patta" contained other clauses to the effect that the lease was granted to the lessee and his heirs, on a fixed rent, to be enjoyed by the lessee in any manner he thought proper, without any reservation regarding the use to which the land was to be put as is to be found in leases where the eventual re-entry of the landlord is contemplated. *Held*, that the document created a permanent lease, the construction of a document depending not so much upon the proper construction of the deed to which the term was applied. (*Wort & Rowland JJ.*)

DARBAR SAHEB vs. BARELAL KANDARP NATH SHA DEO.

17 P.L.T. 488 = A.I.R. 1936 Pat. 275 = 162 I.C. 797.

Construction Agreement to finance intended litigation—half share of property in suit conveyed to financier—consideration money left with vendee—deed, if conveys a present interest.

Deed—(Contd.)

Where A having undertaken to finance a litigation by B in respect of a certain property, B executed a registered deed in favour of A by which he purported to sell half a share of the property to A in lieu of a sum of Rs. 1000/ but the entire sale consideration was left with the vendee to be spent by him on the litigation in the trial court, and subsequently B having withdrawn from the suit, A applied to continue the suit, brought by him and B jointly, *held*, that whatever might have been the terms of the contract between A & B in respect of the expenses of litigation, the deed executed by B in favour of A was a deed of sale conveying property to A *in praesenti* and the latter was therefore entitled to continue the suit. (*Srivastava A. C. J. & Zil-ul-Hassan J.*)

BISHESHWAR PRASAD vs. JANG BAHADUR.
1936 O.W.N. 857 = 164 I.C. 1039 = A.I.R. 1936 Oudh. 410.

Construction—Description of property in body different from description by boundary—which should prevail.

When there is a discrepancy between the description of the property in the body of the grant, and its description by boundaries, the description of the property in the body must prevail. (*Mahammad Noor & Rowland JJ.*)

JYOTIPROSAD SINGH DEO vs. RAJENDRA NARAIN SINGH DEO.

A.I.R. 1936 Pat 287 = 162 I.C. 838.

Construction—Suit by Hindu minor for declaring will and partition deed by deceased father, invalid—compromise decree admitting validity and providing for payment by an elder brother defendant of a certain sum as mesne profits and a certain further sum ex gratia, payment six months of attaining majority—right to recover money if personal right application by mother to be substituted as legal representative and recover money in such capacity, made beyond three years from plaintiff's death and six months from the date when he would have attained majority, but within

Deed—(Contd.)

three years from latter date if maintainable and if within time.

A Hindu minor, through his mother as next friend, brought a suit for declaration that a deed of partition and a will executed by his deceased father were invalid and not binding against him. One of the defendants was the elder step-brother of the plaintiff. By a compromise decree passed in that suit, it was provided that both parties admitted the deeds to be genuine and would take as under them, but the elder brother would pay the plaintiff Rs. 3000 as mesne profits, he having had enjoyment of the properties, and Rs. 2,000 out of grace and affection, with interest, the money to be paid on the plaintiff's executing within six months of his attaining majority, a registered receipt in satisfaction of all claims and delivering the same to the elder brother. It was further provided that the plaintiff would be entitled to recover this sum by execution. The plaintiff died before attaining majority, and after three years from the date of his death but within three years from the date when he would have attained majority, although after six months from that date, his mother applied to be brought on the record as his legal representative and to recover, in that capacity, the money provided for in the compromise decree.

Held, (1) that the right of the deceased plaintiff to recover the money was not a purely personal right and the condition of attaining majority and granting an acquittance receipt within the stipulated time was not a condition precedent to its exercise; (2) that the mother representing the estate of her deceased son for all purposes and being competent to grant a valid release receipt, was entitled to exercise the right as his legal representative; and (3) that the application having been made within three years of the date when the original plaintiff would have attained majority was not time barred under cl(7) of Art. 182, Limitation Act, which applied to the case. (*Lord Moughram*.)

MURUGESAM PILLAI vs MINAKSHI-SUNDARA AMMAL.

63 I.A. 429 = 38 Bom. L.R. 1233 = 1936 O.W.N. 951 = 164 I.Q. 337 = 41 C.W.N. 22 = 17 Pat. L.T. 914 = 71 M.L.J. 831 = A.I.R. 1936 (P.C. 309.)

Deed—(Contd.)

Construction—Sale deed if can be converted into exchange deed by addition of trifling non-pecuniary consideration to price.

The question whether a transaction is a sale or an exchange has to be decided by looking at its substance. A transaction cannot be converted into an exchange merely by the addition of some trifling non-pecuniary consideration to the price so as to defeat the right of a pre-emptor. 31 I. C. 221 relied on. (*Bhide J.*)

NIHALU vs. BHAGAWANA.

38 P.L.R. 632 = A.J.R. 1936 Lab. 234. = 162 I.C. 913.

Title deed—Deposits made in Imperial Bank as purchase price of a particular site, if a document of title.

A certificate from the Treasury officer to the effect that certain deposits were made in the Imperial Bank as purchase price of a particular site is not a document of title. Neither are the copies of Jamabandi and mutation entries such documents. (*Jailal & Sale JJ.*)

PUNJAB & SINDH BANK LTD., LYALPUR vs. GURDIT SINGH.

38 P.L.R. 354 = 161 I.C. 209.

Deed of relinquishment of certain rights valued at more than Rs. 100, when admissible.

Where a document is produced not for any collateral purpose but for the purpose of proving actual transfer or relinquishment of certain rights and the property which is the subject matter of relinquishment is valued at more than Rs. 100, the document must be properly stamped and registered before it can be admitted in evidence. (*Agha Haider J.*)

MAHBUB BEGUM vs. SHER MAHAMMAD.

A.I.R. 1936 Lab. 109 = 162 I.C. 733

Genuineness of deed if can be presumed from certified copies thereof.

In the absence of evidence to prove execution of a document there can be no presumption as to the genuineness of the document

Deed—(Contd.)

so far as the certified copy of such document is concerned. Nor can execution of the document be proved by the registration and endorsement. (*Thom & Iqbal Ahmed JJ.*)

COPAL DAS vs. SRI THANURJI.

A.I.R. 1936 All 422.

Suit on a bond, if liable to be dismissed on the ground of erasure of name of one attesting witness and substituting therefore another name.

There is no provision in law requiring that a bond should be attested. Therefore, the fact that the name of one person who had originally signed the bond as an attesting witness has been erased and that another person has put his signature in the place as an attesting witness, does not amount to a material alteration, so as to entail dismissal of the suit brought on the basis of the bond. (*Jai Lal J.*)

ISHAR SINGH vs. SADHU SINGH.

38 P.L.R. 855 = A.I.R. 1936 Lah. 659 = 165 I.C. 74.

Mortgage by purdanashin lady in respect of property given to her in lieu of dower, mainly to pay her husband's debts—Lady though illiterate, of average intelligence—Deed read out and explained—Deed binding.

It cannot be presumed as a matter of law that a wife cannot intelligently enter into a transaction whereby her own property is mortgaged for securing an advance for her husband. Where, therefore, it is established that such a deed of mortgage executed by a purdanashin lady of average intelligence was read out and explained to her sufficiently, that she was sufficiently apprised of its purport and that she had had advice independent of the mortgagee, and where it is clear from the circumstances that the lady's free consent went with her act in executing the deed, it is not necessary to prove also advice independent of the husband and it is wrong to refuse to find intelligent execution merely on the ground of the supposed

Deed—(Contd.)

impossibility of intelligent consent of such a transaction. (*Sir George Rankin.*)

KUNDAN LAL vs. MT. MUSHARRAFI BEGUM.

63 I.A. 326 = 40 C.W.N. 1093 = 63 C.L.J. 511 = 38 Bom. L.R. 783 = 71 M.L.J. 151 = 44 M.L.W. 373 = 1936 M.W.N. 797 = 1936 A.L.J. 810 = 1936 A.W.R. 736 = 11 Luck. 346 = 1936 O.W.N. 611 = A.I.R. 1936 P.C. 207 = 163 I.C. 156.

DIVORCE.

Person named in plaint as having committed adultery with the respondent, if may apply to be added as a party.

Although it is clearly in the interests of justice that a person who is named in a divorce plaint as being the person with whom the respondent committed adultery, should be allowed to intervene and defend his or her character against the aspersions which have been levelled against him or her, it is doubtful whether the law, as it stands at present, allows such a person to be added as a party to the divorce proceedings. (*Thom J.*)

DOROTHY E. STUART vs. VERNON R. STUART.

57 All. 884 = 163 I.C. 802 = A.I.R. = 1936 All. 488.

DIVORCE ACT (IV OF 1869).

Petition of nullity of marriage—Decree whether should be "nisi" in the first instance.

A decree passed by the High Court sitting for the disposal of matrimonial work in a petition for nullity of marriage should be a decree nisi and not a decree absolute in the first instance. (*Stone & Mockett JJ., Wadsworth, J. dissenting.*)

AGNES SUMATHI AMMAL vs. D. PAUL.

59 Mad. 518 = 70 M.L.J. 321 = 43 M.L.W. 312 = 162 I.C. 675 = A.I.R. 1936 Mad. 324.

Sec 2—Petition for divorce—facts that must be alleged and proved.

A petitioner for divorce under the Indian Divorce Act is required to allege and prove by evidence four facts, viz., (1)

Divorce Act—(Contd.)

that he professes the Christian religion, (2) that the marriage was solemnized in India, (3) that the parties to the marriage were domiciled in India when the petition was presented, and, (4) that the husband and wife resided or last resided together within the local limits of the ordinary jurisdiction of the Court of the District Judge to whom the petition was presented. These facts must be proved and the petitioner is not excused from proving them merely because the respondent admits them. A divorce Court has always to bear in mind the possibility of collusion and must insist on strict proof of all the facts alleged. (*Grille J. C. Subhedar & Pollock A. J. C.s*)

MANOHAR vs. CHANDRAWATI.

31 N.L.R. (Supp.) 174=161 I.C. 409.
A.I.R. 1936, Nag. 26.

Sec. 2—(as amended by Act XX of 1926 and Act XXX of 1907—Parties subjects of Native States—Marriage solemnized in Native State—Suit for decree of nullity of marriage in British India—Jurisdiction.

A husband and wife married in Mysore State and were subjects of that state. The wife filed a petition in the Madras High Court for a decree for nullity of her marriage on the ground of impotence of her husband, *quod*, the petitioner. On an objection as to the jurisdiction of the High Court to entertain the petition, *held*, that under Sec. 2 of the Divorce Act so far as a suit for dissolution of marriage is concerned, a domiciled British subject resident in Mysore State can invoke the jurisdiction of a British Court, but so far as a suit for nullity is concerned, any person resident in India (as distinguished from British India) who has been married in India, can bring a suit for nullity in British India. (*Mockett J.*)

AGNES SUMATHI AMMAL vs. D. PAUL.

59 Mad. 509.

Secs. 2 & 19—Suit for declaration that marriage is a nullity—proper form of decree—jurisdiction of High Court in its Original Side.

Divorce Act—(Contd.)

Under Sec. 2 of the Indian Divorce Act, a suit for declaration of nullity of marriage may be brought in the Original Side of the High Court, by any person resident in India who has been married in India. The decree passed by the High Court in such a suit should in the first instance be a decree nisi. (*Stone & Mockett JJ. Wardsworth, J. dissenting.*)

SUMATHI AMMAL vs. PAUL.

70 M.L.J. 321 (F.B.)=59 Mad. 509 and
518=162 I.C. 675=A.I.R. 1936 Mad.
324.

Sec. 10—Proof of marriage—bare statement of petitioner, if sufficient.

Before the Court can grant a decree for dissolution of marriage it must be satisfied that the marriage did take place and that it was a valid one. A bare statement of the petitioner that he was married to the respondent is not sufficient evidence of marriage. The production of the marriage certificate is necessary. (*Roberts C. J., Baguley & Leach JJ.*)

C. L. DALE vs. MRS. ENID BERYL DALE & ANR.

A.I.R. 1936 Rang. 395.=164 I.C. 712

Secs. 10, 11 & 42—Petition for divorce—Facts that must be proved by petitioner.

In a petition for dissolution of a marriage the petitioner must allege and prove that he professes the Christian religion, that the marriage was solemnized in India that the parties to the marriage, were domiciled in India when the petition was presented and that the husband and wife resided or last resided together within the local limits of the ordinary jurisdiction of the Court of the District Judge to whom the petition was presented—these facts must be proved by evidence, and the petitioner is not excused from proving them merely because the respondent admits them. A Divorce Court has always to bear in mind the possibility of collusion and must insist on strict proof of the facts alleged. (*Grille, J. C. Subhedar & Pollock, A. J. C.*)

MANOHAR BAPUJI KAMBLE vs. CHANDRAWATI.

31, N. L. R. Supp 174=164 I. C 409
=A.I.R. 1936 Nag. 26, (F.B.)

Divorce Act—(Contd.)

Sec. 14—*Delay of 7 years in presenting petition for divorce—Effect of.*

A delay of 7 years in presenting a petition of divorce is prima-facie unreasonable and raises a presumption of connivance and condonation and in such circumstances the petitioner must explain that delay before he could be granted the decree that he seeks. (*Grille, J. C., Subhedar & Pollack, A. J. C.*)

MANOHAR BAPUJI KAMBLE vs. CHANDRAWATI.

31 N.L.R. (Supp) 174=164 I.C. 409=A.I.R. 1936, Nag. 26.

Secs. 16 & 17 A—*Objection to decree nisi being made absolute, if can be taken by the respondent.*

Sec. 16 of the Indian Divorce Act does not join any right to a respondent in the divorce proceedings to object to a decree nisi being made absolute. The words "any person" in that section do not apply to parties to the proceedings and therefore cannot include the respondent. The right can only be exercised by a third party or by the Government Advocate who by a notification in pursuance of sec. 17A of the Act has been appointed to exercise the rights and duties of the King's Proctor in England. The Government Advocate, if consulted, cannot leave the matter in the hands of the Respondent. He must himself consider the respondent's allegations and what may be placed before him in connection therewith and then decide whether he should intervene. If he does not consider it sufficient to justify his intervention, there is an end of the matter so far as he is concerned. If he considers that the evidence does justify him in intervening, it is his duty to intervene. (*Leach J.*)

WILLIAMS vs. WILLIAMS.

14 Rang. 322=165 I.C. 819=A.I.R. 1936, Rang. 499.

Sec. 17—*Jurisdiction of High Court to confirm decree when arises.*

The jurisdiction of the High Court to confirm a decree for dissolution of marriage granted by the District Judge arises immediately upon a reference by the District Court and it is not necessary that there

Divorce Act—(Contd.)

should be any personal appearance of the petitioner before the High Court. Nor can the jurisdiction be destroyed by the fact that the guilty party appears in the High Court and applies for confirmation of the decree. 54 Mad. 330 followed; 10 All. 559, 31 All. 511 dissented from. (*Courtney Terrel C. J., Dhavle & Agarwalla JJ.*)

O. GALLIMORE vs. ALICE GALLIMORE & ANR.

15 Pat. 238

EASEMENT.

Presumption that pathway used by residents of a village is a public pathway.

Where a pathway has been used by all the residents of a village and on both sides of it abut houses of the residents of the village, a presumption arises that the passage has been kept for the common use of the residents of the village and is therefore a public pathway. Under such circumstances there is a presumption of dedication of the land for a public pathway. User for a number of years is not necessary to establish a right to pass over a public pathway. User is merely an evidence of original dedication in such cases. (*Jailal J.*)

USMAN vs. RAHMET.

38 P.L.R. 500=165, I.C. 329=A.I.R. 1936, Lah 797.

Dispute about insufficiency of light—what should be taken into consideration.

In disputes relating to interference of light. Acquired by grant or prescription and not light which has not yet been acquired by prescription, but was only in process of being so acquired can be taken into account. Light coming in sufficient amount from sources other than those in dispute should be taken into account. 159 I.C. 712 reversed. (*Addison & Abdul Raschid JJ.*)

MOHAMMED ZAMAN KHAN vs. MALIK UMAR HAYAT KHAN.

17 Lab 599=38 P.L.R. 1903=A.I.R. 1936 Lah. 792=165 I.C. 291.

Natural right of service drainage—Circumstances under which such right may be restricted.

Easements—(Contd.)

Every land owner has a natural right to deal with a service drain water as he pleases. He can collect and use it on his own land or he can let it find its way by gravitation to his neighbour's land. If that is at a lower level than his own land; but the owner of the lower land may acquire by prescription as an easement restricting this natural right the right to throw water back to the land at a higher level, (*Dunkley J.*)

U PO THET vs. A. L. S. P. P. L. CHETTIAR FIRM.

14 Rang. 544 = A.I.R. 1936 Rang. 282 = 163 I.C. 453.

Water brought on upper land for agricultural purposes flowing uninterruptedly over lower land—Custom as to user, if proved.

If for a sufficiently long time water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The doctrine of lost grant can be invoked in aid of the inference of such a custom. 522 Mad. 426 relied on. (*Venkataramana Rao J.*)

NAGARATHNA MUDALIAR vs. SAMI PILLAI.

59 Mad. 979 = 71 M.L.J. 187 = 1936 M.W.N. 426 = 44 M.L.W. 139 = A.I.R. 1936 Mad. 682 = 164 I. C. 764.

Right of support of building, if can be claimed where such right has not been acquired as an easement.

An owner has got no right for the support of his building or of his land burdened with the additional weight of his building unless such a right has been acquired as an easement. If there is no easement to have lateral support of his building on his neighbour's land, the neighbour is within his right to make excavation on his own land; and provided that he does not act negligently he is not liable at

Easement—(Contd.)

all for damages caused to the building of his neighbour. (*R. C. Mitter J.*)

BENGAL PROVINCIAL RAILWAY CO., LTD vs. RAJANI KANTA DEY.

63 Cal. 441 = 62 C.L.J. 283 = 165 I.C. 371 = A.I.R. 1936 Cal. 564.

EASEMENT ACT (V OF 1882).

Sec. 7, Illus. (i)—Right of owner of higher land to send water naturally flowing on to lower land.

The owner of a land on a higher level is entitled to send down water which naturally flows on to his land into a lower land whether the said water flows into a definite channel or not. This right is not limited to mere rain water falling directly on the land or water which the proprietor might by operations on the land, such as sinking a well or opening a fountain, might cause the water to flow. 38 Mad. 149 & 44 I. C. 500 relied on. (*Venkataramana Rao J.*)

NAGARATHNA MUDALIAR vs. SAMI PILLAI.

59. iMad. 979 = 71 M.L.J. 137 = 1936 M.W.N. 426 = A.I.R. 1936 Mad. 682 = 164 I.C. 764.

Sec. 13 (a)—Sale of land for building purposes—severance of tenements—right of lateral support for building to be constructed, if can be claimed.

When at the time of sale of plots of land for building purposes, there is a severance of tenements, it must be deemed that there is an implied grant of the right of lateral support for the building which is intended to be constructed on those plots against the adjacent plots and the purchaser acquires the said right as an easement under the provisions of Sec. 13 (a) Easements Act. (*Srivastava. A. C. J. & Zia-ul. Hassan J.*)

SRI NATH vs. KEDAR NATH PURI.
1936 O.W.N. 865 = 164 I.C. 1025.

Sec. 13 (e)—Person using a passage over a plot of land, if can, on partition of that plot claim an easement of necessity in respect of the passage.

Easement—(Contd.)

Under Sec. 13 (e), Easements Act, it is not necessary to enquire what was the practice at the time of the partition, but what has to be enquired is, what were the necessities of the case at the time of partition. If at the time of partition, as consequence of the mode of partition, the land had been so divided that a portion could not be used without recourse to a right of way over another portion, then Sec. 13, Easements Act will operate to create a right of way of necessity. Where on a partition, there is another passage in existence, no right of way of necessity can be claimed in respect of the passage previously used as a matter of practice. (*Stone C. J. & Niyogi J.*)

NAWNITDAS LALDASS vs. NARSIDAS.

A.I.R. 1936 Nag. 182 = 165 I.C. 81.

Sec. 15—Acquisition by prescription—method of.

The known methods of acquiring an easement by prescription under the Indian Law are : (1) prescription under the Easements Act where it is applicable (2) prescription under Secs. 26 & 37, Limitation Act, and (3) claim founded on lost grant. Prescription at common law as understood in England cannot be availed of in this country (*Venkataramana Rao J.*)

NAGARATHNA MUDALIAR vs. SAMI PILLAI.

59 Mad 979 = 71 M.L.J. 187 = 1936 M.W.N. 426 = A.I.R. 1936, Mad. 682 = 164 I.C. 764.

Secs. 28 (c), 33 & 35—Interference with free passage of light and air, when actionable.

An injunction cannot be granted in the case of an actual interference with the free passage of light and air unless there is an actionable interference with the easement within the meaning of Sec. 33, Easements Act. The plaintiff must show that the interference would cause substantial damage to him within the meaning of that phrase as explained in the explanation appended to Sec. 33. Whether substantial damage has or has not been caused by an obstruction is

Easement Act—(Contd.)

a question of fact, 4 A. L. J. 477 dissented from; 13 A. L. J. 385, A. I. R. 1924 All. 394 and A. I. R. 1929 All. 430 relied on. (*Harris J.*)

WALI MOHAMMAL vs. BATUK.

1936 A.L.J. 712 = 1936 A.W.R. 525 = 163 I.C. 843 = A.I.R. 1936 All. 517.

Sec. 60 (b)—Works done by licensee on his own land—Licensor's land to what extent bound as a result of such works.

Sec. 60 (b), Easements Act 1882, is not concerned with the effect of an express contract between the parties but with the consequences to follow from a certain conduct on the part of the licensee which if done on the land of the licensor might well give the licensee right against him. The words "acting up on the license" in Sec. 60 (d) mean acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not "act upon a license" if he does works and in his expense upon his own property. That he can do without any one's license, works done by the licensee on his own land many do so without the knowledge of the licensor, and it cannot be held that the alleged licensor's land would be bound in perpetuity (subject to Sec. 62) as the results of some works done by the alleged licensee on his own property of which the former is unaware. (*Lord Maugham.*)

GUJRAT GINNING & MANUFACTURING CO., AHMEDABAD vs. MOTILAL HIRALAL SPINNING & MANUFACTURING CO., AHMEDABAD.

63 I.A. 140 = 40 C.W.N. 417 = 1936 A.L.J. 145 = 1936 A.W.R. 169 = 70 M.L.J. 190 = A.I.R. 1936 P.C. 77 = 63 C.L.J. 160 = 160 I.C. 837 = 38 Bourn. L.R. 353 = 1936 M. W. N. 314.

ELECTION.

Agency—What constitutes agency—entrustment with the work of an agent if may be by implication.

Although in order to make a person chargeable as an agent one has to make out some sort of an entrustment by the candidate with some material part of the business in connection with his election, still such entrustment may be by implication;

Election—(Contd.)

but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. (*McNair J.*)

NASIRUDDIN AHMED vs. HAJI MAHAMMAD YUSUF.

63 Cal. 825 = 40 C.W.N. 741 = 169 I.C. 489.

Doctrine of election agency, if wider than common law agency—responsibility of candidate for misdeeds of agent.

The doctrine of election agency is much wider than common law agency and evidence which would be inadequate to establish agency at common law is often sufficient in election cases to make a candidate responsible for acts committed by other persons. (*McNair J.*)

NASIRUDDIN AHMED vs. HAJI MAHAMMAD YUSUF.

63 Cal. 825 = 40 C.W.N. 741 = 165 I.C. 489.

Responsibility of candidate for misdeeds of agents.

Without doubting that the candidate is always responsible for all the misdeeds of his agent committed within the scope of his authority, it is always a sound principle to remember that a man may become the agent of another either by actual employment or by recognition and acceptance, and to establish agency it is not necessary to show that the candidate himself knew of and accepted voluntary services. Knowledge and acceptance by other persons in control is sufficient. (*McNair J.*)

NASIRUDDIN AHMED vs. HAJI MAHAMMAD YUSUF.

63 Cal. 825 = 40 C.W.N. 741 = 165 I.C. 489.

Temporary president empowered to convene meeting for electing president, if has power to postpone meeting—meeting on date previously fixed, if invalid.

It does not follow that because under the law a temporary president has the

Election—(Contd.)

power to fix the date for the meeting for the election of the President he would have necessarily the power to change or alter the date at his own pleasure. Nor can a meeting held in accordance with a notice issued by one who has the authority under the law to issue it, be deemed invalid because the authority which issued the previous notice thinks fit to change its mind and fix another date. (*Pandrang Row J.*)

K. SANGAPPA vs. SUNKU SUBBARAYULU.

A.I.R. 1936 Mad. 561 = 163 I.C. 814.

ELECTRICITY ACT (IX OF 1910)

Sec. 23 (3) (c)—*Section, if authorises levy of minimum charge without agreement.*

Cl. (c) of Sub-Sec. (3) of Sec. 23 of the Indian Electricity Act contemplates charges made on the basis of consumption and does not authorise a licensee to levy without any agreement with the consumer the minimum charge which really represents interest on the licensee's capital outlay. (*R. C. Mitter J.*)

SAILO BALA ROY vs. THE CHAIRMAN, DARJEELING MUNICIPALITY.

63 Cal. 1047 = 40 C.W.N. 789 = A.I.R. 1936 Cal. 265 = 162 I.C. 811 = 63 C.L.J. 595.

Schedule, cls. vi & xi (a)—*Licensee, if may levy minimum charge from consumer without contract to such effect.*

A licensee for the supply of electrical energy, while he has power under cl. xi (A) of the Schedule to the Indian Electricity Act to levy a minimum charge from the consumers, can exercise that power only through a contract with an intending consumer. In the absence of such a contract the licensee cannot recover a minimum charge from the consumer. (*R. C. Mitter J.*)

SAILO BALA ROY vs. THE CHAIRMAN, DARJEELING MUNICIPALITY.

63 Cal. 1041 = 40 C.W.N. 789 = 63 C.L.J. 595 = A.I.R. 1936 Cal. 265 = 162 I.C. 811

ESTATES PARTITION ACT (V OF 1897.)

Secs. 23 & 25—Scope of the sections.

Sec. 25, Estates Partition Act contemplates a suit in the civil court raising the same questions as are referred to in Sec. 23. Therefore when the Collector has determined under Sec. 23, Cl. (a) to proceed with the partition after the enquiry held by him into the question of possession, all the proceedings thereafter are necessarily subject to and controlled by the decree in the title suit contemplated by Sec. 25 of the Act. (*Nasim Ali & Henderson JJ.*)

SASHI KANTA ACHARJEE CHOUDHURY
vs. RAJENDRA KUMAR CHAKRAVORTY.

40 C.W.N. 112 = 62 C.L.J. 273

Secs. 23, 27 & 119—Partition of estates by revenue authority on rejecting co-sharer's claim for separate possession of specific lands on basis of amicable partition—civil suit for declaration of proprietary right over such specific lands as representing interest in estate, if barred.

A co-sharer proprietor whose claim for separate possession of specific lands on the footing of an amicable partition has been rejected by the partition authorities in proceedings under the Estates Partition Act in the view that there had been no amicable partition, is not thereby debarred from suing in the Civil Court for a declaration that his interest in the estate is represented by a proprietary right over those specific lands. Such a question being a question of extent of interest, the suit is not barred by Sec. 111 of the Estate Partition Act, but is indeed permitted by Secs. 23 to 27. (*Nasim Ali & Henderson JJ.*)

SASHI KANTA ACHARJEE CHOUDHURY
vs. RAJENDRA KUMAR CHAKRAVORTY.

40 C.W.N. 112 = 62 C.L.J. 273.

Secs. 57, 59, 90 & 113—Appeal, if lies to Board of Revenue from an order of the Commissioner remanding case to Collector for fresh partition—Validity of order made by Board of Revenue on appeal when no appeal lay.

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Estates Partition Act—(Contd.)

An order by the Commissioner remanding a case to the Collector for a fresh partition is not an order annulling the partition and an appeal lies therefore to the Board of Revenue. An order made by the Board of Revenue on such an appeal is altogether void and all proceedings consequent thereupon are nullities. Such an order may be questioned in a civil suit and may be set aside by the Civil Court, because the finality attaching to orders of Revenue Courts arises only when their act are not *ultravires* of the Statutes. When they act without jurisdiction their order are liable to be questioned in the Civil Court. (*D. N. Mitter & Patterson JJ.*)

FATEMA BANOO vs KUMAR KAMALA
RANJAN RAY.

40 C.W.N. 539

Sec. 119—Jurisdiction of civil court to effect partition when ousted.

Sec. 119 of the Estate Partition Act excludes jurisdiction of the Civil Court when the question raised before it relates to to question of apportionment of Government revenue between the separate estates formed out of a parent estate or to the details of partition, but does not oust the jurisdiction of the civil court in matters which involve question of title. A civil court has jurisdiction to decide question of title or extent of interest not only between a proprietor and stranger but also between the proprietor themselves. (*Nasim Ali & Henderson JJ.*)

SASHI KANTA ACHARJEE CHOUDHURY
vs. RAJENDRA KUMAR CHAKRAVORTY.

40 C.W.N. 112 = 62 C.L.J. 273.

ESTOPPEL.

Plea of estoppel, if can be raised for the first time in appeal.

The plea of estoppel even though not raised in the trial court may be raised for the first time in appeal, and the appellate Court can entertain the same if the facts on which the plea is based, are patent on the record. (*Bhide J.*)

MANKAUR vs. GURBUX SING & ANR.

38 P.L.R. 90.

Estoppel—(Contd.)

Estoppel against statute—deed void in part and rest severable—estoppel, if applicable to part which is good.

If a deed is void in part only and the rest be severable, estoppel may arise from the part which is good. This is an exception to the general rule that where a deed has been executed in contravention of a statute, the law of estoppel does not apply. (*Mitter & Patterson JJ.*)

KRISHNA PROSAD ROY CHOUDHURY
vs. SECRETARY OF STATE.

63 C.L.J. 52 = A.I.R. 1936 Cal. 774.

Mortgagor executing sham mortgage for defrauding creditor—Mortgage aware of the fraud, subsequently suing on the mortgage—Mortgagee if estopped from pleading the real nature of the transaction.

When both parties to an instrument either know or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which under the instrument are void *ab initio*. Therefore where from the evidence in a mortgage suit, it is clear that the object of the mortgage was to defraud a third person, and the mortgagee was cognizant of, and indeed, a party to the intended fraud, this circumstance will not operate to estop the mortgagor from proving the real nature of the transaction against the claim of the mortgagee upon the instrument. 13 M. I. A. 551 applied. (*Cornish & Stodart JJ.*)

K. R. A. R. P. L. ARUNACHELAM
CHETTIAR & ANR. vs RANAGAEWAMI
CHETTIAR & ORS.

59 Mad. 289 = A.I.R. 1936 Mad. 88.

Mortgage of shares of two brothers by one of them having power to do so—subsequent sale of the equity of redemption—other brother keeping quiet at the time, if estopped from questioning the validity of the sale.

Where one of two brothers mortgaged the shares of both having power to do so, and later on sold the equity of redemption, and

Estoppel—(Contd.)

the other brother raised no objection at the time and kept quiet for several years, held, that he was estopped from questioning the validity of the sale of the equity of redemption on the ground that it could not bind his share in the property. 26 Bom. L. R. 341 relied on. *Beaumont C. J. & N. J. Wadia J.*)

PITAMBAR KHEMJI GUJAR vs. RAJA-
RAM SHAHAJI SUBBARAO.

60 Bom. 220 = 38 Bom. L. R. 205 = A.I.R.
1936 Bom. 175 = 162 I.C. 269.

Mortgagee in Punjab not getting his mortgage recorded in revenue records, if estopped from challenging transfers by mortgagors.

In the Punjab, transfers may be oral, and therefore more importance is attached to the revenue records. If a mortgagee does not get his mortgage entered in the revenue records and thus allows the mortgagor to remain ostensible owner, the mortgagee cannot subsequently challenge the validity of a transfer made by the mortgagor to a person who had taken the property after inspecting the revenue records and finding the property free from encumbrance. 7 Rang. 110 & 276 applied 27 N. L. R. 144 dissented from. (*Addison & Abdul Rashid JJ.*)

ARUR SINGH vs. MST. SANTIN ORS.

A.I.R. 1936 Lah. 405.

Fictitious transfer of property to third person—real owner acknowledging that fictitious transferee has paid consideration—real owner whether estopped from asserting title subsequently.

If the owner of a property confers on a third person a portion of ownership and the right of disposition thereof, not merely by transferring it to him but also by acknowledging that such person had paid the consideration for it, he is estopped from asserting his title as against a person to whom such third party had disposed of the proper-

Estoppel—(Contd.)

ty and who took it in good faith and for value. (*Lord Russel of Killowen.*)

LI TSE SHI vs. PONG TSOI CHING.

1936 A.L.J. 111 = 1936 A.W.R. 207 =
43 M.L.W. 12 = 159 I.C. 794.

EVIDENCE.

Distinction between relevancy and admissibility.

There is a distinction between relevancy and admissibility of a document. Evidence which is not relevant under provisions of the Evidence Act cannot be made relevant because it is led without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, no objection as to its admissibility should be allowed at a later stage. The omission to object to the admission of irrelevant evidence cannot possibly make it relevant. 19 All. 76 relied on. (*Rangilal, J.*)

NANAKCHAND vs. MIAN MAHAMMAD SHAHBAZ KHAN.

A.I.R. 1936 Lah. 114.

Evidence taken on commission—whether formal tendering necessary.

It is not necessary to tender formally, evidence taken on commission on behalf of any party. (*Macpherson & Mohammad Noor J.J.*)

RAGHUNATH RAI RAMBILAS, FIRM vs. SURAJMAL NAGARMAL.

160 I.C. 353 = A.I.R. 1936 Pat. 6.

Documents in previous case when may be relied on.

A party who wishes to rely on any documents in the record of a previous case, must get attested copies of those documents and have them properly admitted in his case. Unless that is done, the documents cannot be admitted in evidence, and any finding passed

Evidence—(Contd.)

on such documents cannot be sustained. (*Young C. J. & Abdul Rashid J.*)

BRIJ NANDAN LALL vs. MT. BHOLI.

38 P.L.R. 231.

Report of a revenue officer appointed to conduct a sale—admissibility in evidence.

The report of a revenue officer appointed to conduct a sale in execution of a decree is not admissible in evidence when such officer has not been examined in respect of it in Court. (*Agha Haidar J.*)

DATARAM vs. PUNJUB NATIONAL BANK LTD.

38 P.L.R. 515.

Entry in school register as to age—value of.

Entries in School registers as to the age of a student are of little value as evidence of age. (*Monroe J.*)

ASANAND vs. GYAN CHAND.

38 P.L.R. 69 = 164 I.C. 751 = A.I.R. =
1936 Lah. 598.

Witness examined in-chief, but not cross-examined—value of such evidence.

The deposition of a witness who was ill, was recorded by a Commissioner.* He was examined in chief, and cross-examined in part when he died. *Held*, that the weight to be attached to the evidence depended on the circumstances of the case. It was the duty of the Court to look at the evidence carefully to see whether there were indications that by complete cross-examination, the testimony of the witness was likely to be seriously shaken, or his good faith to be successfully impeached. 16 C. W. N. 991 relied on. (*Rowland J.*)

MT. HORIL KAUR vs. RAJAB ALI.

A.I.R. 1936 Pat. 34 = 160 I.C. 445 =
17 Pat L.T. 101.

Witness examined on commission—Death of witness before cross-examination—Such evidence, if can be relied upon.

Evidence—(Contd.)

A witness having been taking ill, his deposition was recorded by a commissioner. The witness was examined in chief, but cross examination could not be completed. The question having arisen whether this evidence could be admitted, and if so, what was its real value, *held*, there was no legal objection to receiving in evidence the deposition of the witness, but the weight to be attached to the evidence depended on the circumstances, and it was the duty of the Court to see whether there were any indication that by a complete cross examination the testimony of the witness was likely to be seriously shaken or his good faith likely to be impeached. (*Rowland J.*)

MT. HORIL KUER vs. RAJAB ALI,

17 P.L.T. 101 = 160 I.C. 445 = A.I.R. 1936 Pat. 34.

Power of Appellate Court to appreciate evidence taken by lower Court in its own way

When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect irrespective of whether the Judge makes any observations with regard to the credibility of the witness or not. An appellate Court cannot set aside the evidence, of the original Court who enjoyed those privileges, unless it comes to a clear conclusion that the Judge who enjoyed those privileges was plainly wrong. (*Page C. J. & Mya Bu, J.*)

U. CHINAYA vs. U. KHAY.

14 Rang. 11 = A.I.R. 1936 Rang. 5 = 162 I.C. 387.

Appreciation may be of evidence by Primary Court when discarded by appellate Court

Where the issue is a simple one, the appellate Court should not very lightly discard the appreciation of evidence made by the trial Court which had the opportu-

Evidence—(Contd.)

nity of seeing the witness, hearing them and watching their demeanour. (*Mitter & Paterson JJ.*)

SURENDRA NATH ROY vs. KEDAR NATH BOSE.

63 C.L.J. 86 = 161 I.C. 224 = A.I.R. 1936 Cal. 87.

Suit on basis of sale contract—vendee calling perjured evidence to prove major part of consideration—evidence as to minor part, if can be believed as true.

Where in a suit on the basis of a contract of sale, the vendee calls evidence to prove the passing of the major part of the consideration, but the evidence is found to be perjured, it is not open to the vendee to ask the Court to believe the evidence in respect of a minor part of the transaction as true. (*Harries J.*)

MANBHARI vs. SRI RAM.

1936 A.W.R. 720 = 1936 A.L.J. 1215 = 165 I.C. 240 = A.I.R. 1936 All. 672

EVIDENCE ACT (I OF 1872).

Sec. 12—Imputation of misconduct—truth pleaded in defence—evidence of statement having been made by woman to several persons, if relevant.

Where a defamatory statement complained of consists of an imputation of bad conduct towards a woman, and truth is placed in defence of the action, evidence that the female with whom misconduct was alleged herself made statement to that effect to a considerable number of persons is relevant under Sec. 12 of the Evidence Act for enabling the Court in assessing damages to be awarded, (*Dunkley J.*)

MA SEIN TIN vs. U KYAW MAUNG.

A.I.R. 1936 Rang. 332 = 164 I.C. 385.

Sec. 13—Evidentiary value of judgments relating to the subject matter in issue.

Judgments of Courts in a previous suit relating to the subject matter in issue, though they may not have binding effect

Evidence Act—(Contd.)

upon the parties, are undoubtedly of great evidentiary value under Sec. 13 of the Evidence Act (*Zia-ul-Hasan J.*)

GULAI vs. SRIPAL.

1936 O.W.N. 375 = 162 I.C. 334.

Sec. 13—Weight to be attached to a judicial decision for the purpose of proving custom.

It is not right for Courts to place greater value on a judicial decision than on statement of a custom in the customary law in the Punjab. A judicial decision depends on the evidence produced in the case which may be a badly conducted one. A decision on a question of custom is not a judgement in rem, it is merely an instance, relevant under Sec. 13, Evidence Act of a particular custom being asserted or denied, or possibly recognised, though the word recognised may mean recognised by the party to a particular transaction rather than by the Courts. (*Addition J.*)

BALANDA vs. MST. SUBAN.

17 Lah 232 = 38 P.L.R. 592 = A.I.R. 1936 Lah. 418.

Sec. 13—Judgment showing possession of one of the parties—admissibility.

A judgement which is not binding on one of the parties to a suit may be used under Sec. 13, Evidence Act as an instance when the possession of the other party over the plots in suit was challenged and found to be proved. (*Nanav ty & Zia-ul Hassan JJ.*)

SHER BAHADUR SINGH vs. SRI MADHO PRASAD SINGH.

11 Luck. 209.

Sec.—13—Decision on custom, when becomes relevant.

A decision on custom is not a final decision. It becomes a relevant instance under Sec. 13 of the Evidence Act, that such a right has been ascertained and recognised. It is always necessary to assert and prove what the custom is. (*Addison & Din Mohammed JJ.*)

NABAIN SINGH & ORS. vs. AHMED YAR KHAN.

17 Lah. 133 = 38 P.L.R. 472 = 162 I.C. 374 = A.I.R. 1936 Lah 21.

Evidence Act—(Contd.)

Sec. 13 (b)—“Claim”—Significance of the expression.

The word “claim” in Sec. 13 (b) of the Evidence Act indicates that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim. The mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right. (*Agarwalla & Varma, JJ.*)

JYOTIPROSAD SINGH DEO vs. BHARAT SHAH BABU.

15 Pat. 260 = 17 P.L.T. 507 = 165 I.C. 589 = A.I.R. 1936 Pat 543.

Sec. 13 (b)—“Particular instance in which the exercise of the right was asserted”—Meaning of the expression.

The mere statement in a deed of a sale that the vendor had a Nishkar right cannot be said to be an instance when the exercise of the right was asserted within the meaning of the words “particular instance in which the exercise of the right was asserted” in the second part of paragraph (b) of Sec. 13 of the Evidence Act. 31 C. W. N. 32 applied. (*Agarwalla & Varma, JJ.*)

JYOTIPROSAD SING DEO vs. BHARAT SHAH BABU.

15 Pat. 260 = 17 P.L.T. 507 = 165 I.C. 589 = A.I.R. 1936 Pat 543.

Sec. 20—Principle of admissibility under the section.

Sec. 20, of the Indian Evidence Act contemplates the existence of three parties namely, party who refers, party who is referred to and party to whom reference is made; the principle on which admissibility is based being that when one party refers another party to a third party for information, the referring party is presumed to undertake to adopt as his own the information furnished by the third party. These conditions are not fulfilled when a master calls for a report from a servant where there is nothing to indicate that in so doing

Evidence Act—(Contd.)

he intended to regard the servant's report as conclusive. (*Panckridge J.*)

M. D'CRUZ & ORS. vs. SECRETARY OF STATE.

40 C.W.N. 865.

Secs. 20 & 32—*Report by servant to master at latter's instance, if and when admissible against the master.*

In a suit by a dismissed servant for damages for wrongful dismissal, a report by another servant to his master submitted at the direction of the latter, even when corroborative of the account of an affair given by the dismissed servant is not admissible in evidence of the facts alleged therein, either as an admission by the master or under Sec. 20, of the Indian Evidence Act. (*Panckridge J.*)

M. D'CRUZ & ORS. vs. SECRETARY OF STATE.

40 C.W.N. 865.

Secs. 21 & 145—*Suit on promote—defendant pleading signature on blank paper—plaintiff producing affidavit in previous case admitting loan and handnote—value of such affidavit.*

In a suit on a promote, the defendant pleaded that he had put his thumb impression on a blank sheet of paper, and that no consideration had passed. During cross-examination of the defendant, an affidavit which had been filed by the defendant in a probate case wherein he had admitted the loan and the execution of the promote, was tendered to him, and he admitted the signature on it. The Court thereupon treated this admission as sufficient evidence and decreed the suit. The defendant, in appeal, contended that the statements in the affidavit ought not to have been used as evidence unless the defendant's attention had been drawn to them. *Held*, that Sec. 145, Evidence Act was not applicable to the case. The affidavit relied on was not relevant by virtue of this section, but amounted to an admission, which was

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relevant under Sec. 12 of the Act. (*James & Rowland JJ.*)

RAMKEESHWAR DAS vs. BALDEO SINGH,

17 P.L.T. 621=165 1 C. 805=A.I.R. 1636 Pat. 588.

Secs. 32 (2) & 12—*Maps prepared by person dead, if admissible.*

Registers and maps regarding the land in dispute prepared by persons who are dead or whose whereabouts cannot be traced are admissible in evidence under the provisions of Sec. 32 (2) read with Sec. 13 of the Evidence Act. (*Wort A. C. J. & Fazl Ali, J.*)

RAJENDRA NARAYAN SINGH DEO & ORS. vs. LAL MOHAN TRIBENI.

A.I.R. 1936 Pat. 462=164 1 C. 277

Sec. 32 (3)—*Statement by deceased person not against proprietary or pecuniary interest—evidence to prove such statement, if admissible.*

The evidence of witnesses tendered for the purpose of having certain statement by a deceased person would not be admissible under Sec. 32 Evidence Act when such statements are not against the property or pecuniary interest of the deceased. (*Page, C. J. & Mya Bu, J.*)

U. CHINAYA vs. U. KHAY.

14 Rang. 11=A.I.R. 1936 Rang. 5=161 I.C. 337.

Sec. 32 (3)—*Recital in documents between third parties, if admissible.*

A document between strangers to the suits in which mention is made of one of the parties or their predecessors as holding the land in dispute lying on the boundaries of lands belonging to the executant of the document is not relevant to prove title to the land in dispute. 41 C. L. J. 374 & 91 I. C. 688 followed. (*Rangilal, J.*)

NANAKCHAND vs. MIAN MAHAMMED SHAHBAZ KHAN.

A.I.R. 1936 Lah. 114.

Evidence Act—(Contd.)

Sec. 32 (5)—Evidence of incidents bearing on adoption, if admissible.

Where the relationship created by adoption is of such importance as specifically included in the Act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed, subject however, to careful scrutiny as to value. (*Amir Ali J.*)

HARIDAS CHATTERJEE vs. MANMATHA NATH MALLICK.

160 I.C. 332 = A.I.R. 1936 Cal. 1.

Sec. 34—Admissibility in evidence of true and correct entries in accounts, when not regularly kept,

Entries in account books which are beyond reasonable doubt, true and correct, and may or may not be admissible under Sec. 34, Evidence Act, are admissible to corroborate the oral evidence, even where the accounts are found to have been not regularly kept. (*King C. J. & Thomas J.*)

JANQU vs. JOT SINGH.

1936 O.W.N. 582.

Sec. 35—Documents containing opinion of Govt. officer, if admissible.

Documents consisting of mere opinions expressed by Government officer in secretariat correspondence, where no personal enquiries had been made in the matter, by the said officers, are inadmissible in evidence. (*Addison & Din Mohammad JJ.*)

GHULAM KHAN & vs. SAMUNDAR KHAN.

38 P.L.R. 748 = A.I.R. 1936 Lah. 37 = 165 I.C. 626.

Sec. 35—Commissioner appointed to make enquiry into particular facts—report how may be proved

A Commissioner appointed by a Court to enquire into the facts of a case, is not a person performing a duty specially enjoined by the law of his country, and hence the report of the Commissioner is a private document

Evidence Act—(Contd.)

which like any other private document can be proved only by examining the writer of that report as a witness in the case. (*Nanavutty J.*)

IBRAHIM REG vs. AZIMAN.

1935 O.W.N. 1358 = A.I.R. 1936 Oudh 192.

Sec. 35—Records of existing rents and assets of estate published under Sec. 48 of Estates Partition Act, if public record—Entry in such record, if admissible against owner of adjoining estate, not served with notice under Sec. 50 (c),

The Record of the existing rents and assets of an estate published under Sec. 48 of the Estates Partition Act is a public or official record within the meaning of Sec. 35 of the Evidence Act, and accordingly, in a subsequent suit between the owners of the partitioned estate and the owner of an adjoining estate over a plot of land, an entry in such record showing the disputed land as appertaining to the partitioned estate is admissible in evidence against the owner of an adjoining estate although notice under Sec. 50(c) of the Estates Partition Act may not have been served upon him. At any rate, the fact that the land was claimed in the partition proceedings as appertaining to the partitioned estate is a transaction within the meaning of Sec. 13, and as such relevant, (*Nasim Ali & Edgely JJ.*)

CHATTERJEE ESTATES, LTD. vs. DHIRENDRA NATH ROY.

40 C.W.N. 821.

Sec. 35—Wajib-ul-arz produced from office of Deputy Commissioner and bearing seal and signature of Settlement Officer, if admissible in evidence when signature of person from whom information collected is wanting.

A *wajib-ul-arz* bearing seal and produced from archives of the office of the Deputy Commissioner and bearing signature of the Settlement Officer and of the Munsarim and clerks certifying that the copy has been duly compared, is admissible in evidence under Sec. 35, Evidence Act, even if it does not bear the signature of the person from whom the materials incorpora-

Evidence Act—(Contd.)

ted therein were collected by the Settlement Officer in the execution of his duty. 71, A. 63 relied on. (*King C. J. & Zia-ul-Hassan J.*)

KEOLAPATI vs. HARNAM SINGH.

1936 O.W.N. 619=162 I.C. 527=A.I.R.
1936. Oudh 293.

Sec. 47—Signature, proof of.

When the fact to be proved is a signature and a witness merely says that the signature is of the person concerned, there is no proper evidence of the facts required to be proved under Sec. 47 of the Evidence Act (*Sir George Rankin.*)

SURENDRA KRISHNA ROY vs. MIRZA MAHAMMAD SAYED ALI MUTWALLI.

40 C.W.N. 226=1936 O.W.N. 10=1936
M.W.N. 22=1936 A.L.J. 84=38 Bom.
L.R. 330=63 C.L.J. 29=19 N.L.J. 29=
160 I.C. 29=1936 A.W.R. 45=38 P.L.
R. 19=A.I.R. 1936 P.C. 15=70 M.L.J.
206.

Secs. 65 & 66—Purpose of, and discretion of Court as to notice.

The only purpose of a notice under Secs. 65 & 66 of the Evidence Act is to give the party an opportunity by producing the original, to secure, if he pleases the best evidence of the contents; and under Sec. 66, the Court has absolute power when it thinks fit to dispense with a notice under these sections. (*Sir George Rankin.*)

SURENDRA KRISHNA RAY vs. MIRZA MAHOMED SAYED ALI MUTWALLI & ORS.

63 I. A. 85=40 C.W.N. 226=1936
A.W.R. 45=1936 O.W.N. 10=436
M.W.N. 22=1936 A.L.J. 84=38 Bom.
L.R. 330=63 C.L.J. 29=19 N.L.J. 29=
160 I.C. 29=38 P.L.R. 19=A.I.R. 1936
P.C. 15=70 M.L.J. 206.

Secs. 65 & 66—Defendant whose defence depends upon document not producing original which is likely to be with him—plaintiff putting in certified copy without notice to defendant to produce original—certified copy, if may be admitted in evidence.

Where a defendant admitted possession of a document in a previous proceeding but in a subsequent proceeding did not file

Evidence Act—(Contd.)

it, denied having ever received it, and gave no account of what had happened to it, but said generally that he had made over his document to his mortgagee who was another defendant, and the latter did not produce it either, and the plaintiff was allowed to put in a certified copy of the document, without giving any notice to the first defendant, to produce the original, held, that the certified copy was properly admitted in evidence. (*Sir George Rankin.*)

SURENDRA KRISHNA RAY vs. MIRZA MAHOMED SAYED ALI MUTWALLI & ORS.

63 I. A. 85=40 C.W.N. 226=1936
A.W.R. 45=1936 O.W.N. 10=1936
M.W.N. 22=1936 A.L.J. 84=38 Bom.
L.R. 330=63 C.L.J. 29=19 N.L.J. 29=
160 I.C. 29=138 P.L.R. 19=A.I.R.
1936 P.C. 15=70 M.L.J. 206.

Secs. 65 & 90—Production of copy of a document—presumption that may be drawn.

Sec. 90, Evidence Act, requires the production to the Court of the particular document in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under Sec. 65, as secondary evidence, and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, but the production of a copy is not sufficient to justify the presumption of due execution of the original under Sec. 90. 62 I. A. 192 relied on. (*King C. J. & Zia ul-Hussain J.*)

KEOLAPATI vs. HARNAM SINGH.

1936 O.W.N. 619. 162 I.C. 527=
A.I.R. 1936. Oudh 298.

Secs. 65 & 90—Certified copy less than 30 years old—Presumption under Sec. 90, if can be drawn.

Where the certified copy of a document is less than 30 years old, the presumption under Sec. 90 cannot be raised in respect of it. 52 Mad. 453 relied on. (*Agha Haider J.*)

MT. MELKH BANO vs. MAHOMED BENARES KHAN.

A.I.R. 1936 Loh. 783.

Evidence Act—(Contd.)

Sec. 66—*Court dispensing with notice to produce documents and allowing secondary evidence of its contents—Objection, if can be taken in appellate Court when not taken the trial Court.*

Under Sec. 66, Evidence Act a notice to produce a document must previously have been given to the party in whose possession or power the document is before giving secondary evidence of its contents, but such notice is not essential to render secondary evidence admissible in certain cases, one of which is when from the nature of the case the adverse party must know that he will be required to produce it, and another of which is where the Court thinks fit to dispense with it. An objection to the admission of secondary evidence should however be raised at the time of the reception of the evidence and no objection should be allowed to be taken in the appellate court as to the admissibility of such evidence when it was admitted in the trial court without any objection. 19 Cal. 438, 31 Cal 155, 38 Mad. 160 & 14 Lrb. 473 followed. (*Mya Bu J.*)

U PO, KIN & ANR. vs. U SO GALE.

A.I.R. 1936 Ran, 277 = 163 I.C. 408 (2)

Sec. 66—Proviso (2)—*Document produced from custody of person asserting title—Inference to be drawn.*

The fact that the documents of title are produced from the custody of a certain person is of importance in considering a question of benami, but the Judge in considering such a question, is not bound to come to the conclusion that, in the event of a document being produced from the custody of a person asserting that title, his case is made out. (*Wort & Rowland JJ.*)

MT. BIBI ZAINAB vs. MOHAMMAD AYUB.

17 P.L.T. 386 = A.I.R. 1936 Pat. 136 = 163 I.C. 331 (2).

Sec. 66, Proviso (2)—*Objection by party to the admission of secondary evidence—original in possession of party objecting but not producing it—procedure.*

Evidence Act—(Contd.)

Where a party objects to the admission of secondary evidence, and it is found that the original document is in possession or control of the party taking the objection, the provision of Sec. 66, proviso (2) must be deemed to apply, and it is not necessary to serve notice to the party in possession to produce the original, as by the nature of the case, the party must be held to be knowing that it would be required to produce it. (*Wort & Rowland JJ.*)

SUDHAKAR MISRA vs. NILKANTHA DAS.

A.I.R. 1936 Pat. 129 = 161 I.C. 465.

Sec. 68—*Mortgage deed—execution admitted but attestation denied—proof of attestation absent—document if can be held to be duly attested.*

In a suit on the basis of a mortgage, it is the duty of the plaintiff to prove due attestation of the mortgage deed, even though the execution of the document is admitted by the defendant. Where there is no evidence nor any proof of the attestation, the document cannot be held to have been proved to have been duly attested. 52 I. A. 362 referred to. (*Sulaiman O. J. & Bennet J.*)

BINDHESWARI PRASAD vs. PANCHAYATI AKHARA MAHANIRVANI GOSAIN NAGA SECT.

1936 A.W.R. 57 = 1936 A.L.J. 297 = 160 I. C. 73 = A.I.R. 1936 All. 169.

Secs. 68 & 70—*Denial of attestation only—necessity of calling attesting witness to prove execution.*

In a case where attestation according to law is specifically denied but the signing of the document required to be attested is not so denied, it is necessary to call at least one attesting witness to prove execution under Sec. 70 of the Evidence Act. (*Nasim Ali J.*)

EBRAHIM MANDAL vs. AKOY KONAR.

49 C.W.N. 151 = 82 C.L.J. 25.

Sec. 68 & 71—*Denial of execution or attestation—execution how to be proved.*

Evidence Act—(Contd.)

In case of execution or attestation, all that Sec. 68, Evidence Act requires is that one attesting witness at least is called for the purpose of proving its execution. If the attesting witness does not recollect as to whether he had attested the deed in the presence of the executants, the execution of the deed can be proved by other evidence. (*Harries & Ganga Nath JJ.*)

BANARSI DAS vs. COLLECTOR OF SAHAEANPUR.

1936 A.W.R. 887=1936 A.L.J. 1262=
A.I.R. 1936 All. 712=165 I.C. 498.

Sec. 85—Power of attorney—Presumption of due execution—absence of—Whether opposite presumption that it was not duly executed arises.

Under Sec. 85, Evidence Act, a Power of Attorney is presumed to have been properly executed if it has been verified by a Magistrate or certain other officer. Where there is no such presumption in favour of a particular Power of Attorney, it does not follow that there is an opposite presumption that it had not been duly executed. (*Allsop & Ganga nath JJ.*)

MST. RAM KAILASH KUNWARI vs. ISHWARI SARAN.

A.I.R. 1936 All. 471=1936 A.W.R. 497.

Sec. 90—Ancient documents—Presumption of genuineness.

The presumption under Sec. 90 of the Evidence Act, regarding the genuineness of ancient documents must be applied with caution. An ancient document which is unsupported by any evidence that might free it from the suspicion of being fabricated should not be acted upon. (*Monroe & Rangilal JJ.*)

SARLARA vs. AKBAR.

38 P.L.R. 322.

Sec. 90—Presumption as to genuineness of a document more than thirty years old, when can arise.

Evidence Act—(Contd.)

No legal presumption can arise as to the genuineness of a document more than thirty years old, merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognisance, and which had come under the cognisance of such Court. (*Nanavutty & Smith JJ.*)

SRI PROSAD vs. SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR.

1936 O.W.N. 768=164 I.C. 494.

S. 90—Document more than 30 years old—Presumption under the section.

In the case of documents purporting or proved to be 30 years old and produced from proper custody, S.90 allows the Court discretion to presume that the signature and every other part of such documents which purport to be in the handwriting of any particular person is in that person's hand writing and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purports to be executed and attested. (*Sri-vastava & Nanavutty, JJ.*)

SPECIAL MANAGER, COURT OF WARDS BALRAMPUR vs. TRIVENI PROSAD & ORS.

11 Luck 35.

Sec. 90—Presumption, if any, as to the genuineness of a seal.

Sec. 90, Evidence Act, makes no provision for any presumption in regard to seals, and a seal cannot be regarded as a signature within the definition contained in the general Clauses Act. (*Nanavutty & Smith JJ.*)

SIR PROSAD vs. SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR.

1936 O.W.N. 768=164 I.C. 494.

Sec 90—Document 30 years old—signature on it not properly proved but made of proof not objected to at the time—presumption under the section, if may be made.

Evidence Act—(Contd.)

Where the fact to be proved was a signature, and the document bearing the signature was 30 years old, it was produced from proper custody, the cross-examination was not directed to showing that the witness was unacquainted with the handwriting of the person concerned and there was a note by the Court, namely, 'signature proved', suggesting that no objection was taken at the time, *held*, that the presumption under Sec. 90 could properly be made in respect of the document. (*Sir George Rankin*.)

SURENDRA KRISHNA ROY vs. MIRZA MAHOMED SAYED ALI MUTWALI & ORS.

639 A. 85=40 C.W.N. 226=1936 A. W.R. 48=1936 A.L.J. 84=1936 O.W.N. 10=1936 M.W.N. 22=70 M.L.J. 206 =A.I.R. 1936 P.C. 15=160 I.C. 29.

Sec. 60—Old deeds of Shankalap, conferring under proprietary rights, how far to be presumed to be genuine.

The Courts should be very careful about raising any presumption under Sec. 90, Evidence Act, in favour of old deeds of Shankalap which are produced practically for the first time during the trial of suits in which under proprietary rights are set up on the basis of those deeds, unless they are supported by evidence that might free them from the suspicion of being fabricated. Where the *wajib-ul-arz* and *rubkar* of the last Settlement of the village both show that as a matter of fact no under proprietary right had been conferred on any one in the village, the value of these documents is completely destroyed. (*Nanavutty & Smith JJ.*)

SRI PRASAD vs. SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR.

1936 O.W.N. 768=164 I.C. 494.

Sec. 90—Entry in school register which is over 30 years old—presumption of genuineness.

Where a school register which was over 30 years old was produced from proper custody and reliance was placed on certain entries in the register, *held*, that a presumption of genuineness attached to the register, and the fact that the person responsible for

Evidence Act—(Contd.)

the entries was not produced as a witness was immaterial. (*Jailal & Sale, JJ.*)

PARMODH CHAND vs. NARAIN SINGH.

A.I.R. 1936 Lah. 104=163 I.C. 81.

Sec. 90—Point of time from which 30 years to be calculated.

Under Sec. 90 of the Evidence Act the period of 30 years is to be reckoned not from the date upon which the deed is filed in Court but from the date on which it having been tendered in evidence its genuineness or otherwise becomes the subject of proof. (*Sir George Rankin*.)

SURENDRA KRISHNA ROY vs. MIRZA MAHOMED SAYED ALI MUTWALI & ORS.

639 A. 85=49 C.W.N. 226=1936 A. L.J. 84=38 Bom. L.R. 330=63 C.L.J. 29=19 N.L.J. 29=160 I.C. 29=38 P.L.R. 19=1936 O.W.N. 10=A.I.R. 1936 P.C. 15=70 M.L.J. 206 (P.C.)

Sec. 90—Discretion under the section—Appellate Court if can interfere with such discretion.

Ordinarily, an appellate court would be slow to interfere with the discretion exercised by the lower court in the matter of raising presumption under S. 90, but the discretion allowed by the section is a judicial discretion which has to be exercised on sound legal principles and after due regard to all the evidence and circumstances. If the discretion has been exercised arbitrarily without due consideration of all the relevant facts and circumstances of the case the appellate court can certainly interfere. (*Srivastava & Nanavutty, JJ.*)

SPECIAL MANAGER, COURT OF WARDS BALRAMPUR vs. TRIVENI PRASAD.

11 Luck. 35.

Sec. 91—Suit on written contract—defendant, if can disprove by oral evidence.

Sec. 91, Evidence Act only excludes oral evidence as to the terms of a written contract, but a defendant sued upon a written contract purporting to have been

Evidence Act—(Contd.)

signed by him cannot be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. (Sir John Wallis)

TYAGARJA MUDALIYAR vs. VEDA-THANNI.

63 I.A. 126=40 C.W.N. 353=70 M.L.J. 232=1936 O.W.N. 120=A.I.R. 1936 P.C. 73=160 I.C. 384=38 P.L.R. 156=1936 A.L.J. 136=59 M.L.J. 446=63 C.L.J. 353=1936 A.W.R. 242=8 Bom. L.R. 373=19 N.L.J. 104=1936 M.W.N. 310=78 M.L.J. 232 (P.C.)

Sec. 91—Kabuliat evidencing a contract by lessor to give khas possession—Oral evidence, if admissible to prove any other arrangement.

Where from the terms of a kabuliat it appeared clearly that the lessor had stipulated to give khas possession to the lessee it, is not open to the lessor to adduce evidence to show that there was some other arrangement between the parties. (Jack, J.)

NABIN CHANDRA ROY vs. RAJENDRA KUMUR NAG.

A.I.R. 1936 Cal. 302.

Sec. 91—Promote given for antecedent debt and one given for contemporaneous loan—Contract aliunde if can be proved.

When a promissory note given for an antecedent debt is found to be unstamped and therefore inadmissible in evidence, the original debt can be sued upon irrespective of the subsequent document or promissory note; but with regard to contemporaneous loans and promissory notes, the position is that, where the promissory note is the consideration for the loan, the debt cannot be proved aliunde, in view Sec. 91, Evidence Act. (Beasley C. J., Cornish & Pandrang Row JJ.)

RAMESWAMI PILLAI vs. MURUGIAH PADAYACHI.

59 Mad. 268=70 M.L.J. 267=43 M.L.W. 145=161 I.C. 273=A.I.R. 1936 Mad 179.

Secs. 91 & 92—Acknowledgment of receipt of consideration of a sale-deed—Oral

Evidence Act—(Contd.)

evidence to prove that amount acknowledged was not received, if admissible.

Where in a suit the defendant set up the defence that consideration of the sale deed was not the amount stated therein but a lesser sum and that the extra sum had been entered in the sale deed in order to defeat and delay possible pre-emptors, held, that the amount of sale consideration is a term of a deed of sale, and when the terms of a deed of a sale have been proved according to Sec. 91, Evidence Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to or subtracting from the amount of sale consideration. The acknowledgment of receipt of the whole or part of the sale consideration in the deed of sale was however not a term of the deed of sale, and oral evidence could be given to show that the amount acknowledged or any part of it was not received. (Sulaiman C. J., Bennet & Harris JJ)

MAHAMMAD TAQI KHAN vs. JANG BAHADUR.

58 All. 1.

Sec. 92—Suit between executant and beneficiaries of a Wakf—Wakif, if can give evidence to explain what he meant by the provisions of the Wakf nama.

The beneficiaries under a Wakf deed are parties to the document within the meaning of Sec. 92, Evidence Act, and in a suit between the executant of a Wakf and the beneficiaries, the Wakif cannot be allowed to give in his evidence an explanation of what he meant by the provisions of the Wakfnama. (Bennet & Harris, J.J.)

AHMED ALI KHAN vs. MOHAMMAD AITZAD.

1936 A.L.J. 793=1936 A.W.R. 647=165 I.C. 15=A.I.R. 1936 All. 704.

Sec. 92—Suit for dower amount mentioned in Kabilnama—Oral evidence if admissible to prove that the Kabilnama did not represent the actual agreement between the parties.

Evidence Act—(Contd.)

In a suit for recovery of dower money the plaintiff relied on a Kabilnama in which the dower amount was mentioned. The defendant contended that the amount mentioned in the Kabilnama was not intended to be paid, and offered to give oral evidence to prove his plea. *Held*—

Per Agha Haidar J.—Oral evidence to prove such plea was not admissible being barred by Sec. 92 of the Evidence Act.

Per Tekchand J.—Oral evidence was admissible to prove such plea because Sec. 92 operates as a bar only when oral evidence is sought to be allowed to vary or to modify the terms of an agreement. Oral evidence is admissible to prove that an agreement in writing was not an agreement at all and was not intended to be acted upon. (*Tekchand & Agha Haidar JJ.*)

MAHAMMAD SUITAN BEGUM vs. SARAJUDDIN AHMED.

38 P.L.R. 337 = A.I.R. 1936 Lah. 183 = 161 I.C. 300.

Sec. 102—*Person signing deed alleging recitals therein to be incorrect—Burden of proving allegation.*

Where a person signing a document alleges that the recitals therein are incorrect and do not represent the true state of facts the burden lies on him to show that it is so. 29 All. 184 and 7 N. L. R. 23 relied on. (*Vivian Bose, J.*)

MST. NASIBAN vs. MOHAMMAD SAYAD.

19 N.L.J. 179 = A.I.R. 1936 Nag. 174 = 164 I.C. 557.

Sec. 102—*Statutory compensation to workman for disease cause by silica—onus of proving that disease not caused by silica dust lies with the employer.*

By the Workman's Compensation Act provision is made for the payment of compensation by the employers of workman in specified industries and processes involving exposure to silica dust who suffer death or total disablement or partial disablement from diseases caused by exposure to silica dust. On a question as to the burden of proof that the disease was caused by silica

Evidence Act—(Contd.)

dust, *held*, that the workman in order to establish his claim need only prove that he has contracted a disease out of or in the course of employment, leaving it to the employer to show that the disease was not caused by silica dust. (*Sir Sidney Rowlatt.*)

METROPOLITAN COAL CO., LTD., vs. JACOB BAI,

A.I.R. 1936 P.C. 158 = 163 I.C. 628.

Sec. 114 *Presumption that pleader had authority to compromise—Onus of proving absence of such authority.*

When a decree is passed by a Court on compromise, it must be assumed that the Court must have satisfied itself that the pleader effecting the compromise had authority to act on behalf of the party whom he represented in the manner he did. Where it is alleged that the pleader had no such authority to make such a compromise the onus lies on the person who makes such allegations to prove the same. (*Jailal J.*)

NIJAZ ALI & vs. MST. BEGUM BIBI.
38 P.L.R. 467

Sec. 115—*Doctrine of acquiescence elements of.*

The doctrine of acquiescence is but another phase of estoppel. The basis of both is a representation made to the other side, intended to be acted upon and in fact acted upon, by doing some act or spending money which would not otherwise have been done. Only, in the case of estoppel, the representation is active, while in acquiescence it may be inferred from silence, which, however cannot be mere silence but silence, when there is a duty to speak, and therefore, amounting to fraud. (*R. C. Mitter J.*)

ABDUL KADER CHOUDHURY vs. UPENDRA LAL BARUA.

40 C.W.N. 1370 = A.I.R. 1936 Cal. 711.

Sec. 115—*Acquiescence—Facts required to be proved—onus.*

In order to found acquiescence, the party seeking to do so must prove that (1) he

Evidence Act—(Contd.)

was under a mistaken belief as to his rights (2) he did some act or spend some money under such belief; (3) the possessor of the legal right knew of his true right which was inconsistent with the right asserted; (4) that he knew also of the mistaken belief of the other party as to his rights; and that (5) he encouraged such other party in his expenditure of money or other acts directly or by abstaining from asserting his legal rights. (*R. C. Mitter J*)

ABDUL KADAR CHOUDHURI vs. UPENDRA LAL BARUA & ORS.

40 C.W.N. 1370 = A.I.R. 1936 Cal. 711.

Sec. 115—*Father acquiring property in name of son if estopped from pleading that the property was his own.*

When a person acquires property with his own money, but in the name of his son, he is not estopped from later pleading that the property was not the property of the son, where the party pleading estoppel knew or on enquiries would have known that the property was acquired by the father out of his own money, and that the son was never in a position to acquire such property. (*Pollock J.*)

GOPAL TRIMBAK BHATE vs. KESHEOSA VISHNOOSA LTD.

I.A.R. 1936 Nag. 65 = A.I.R. 1936 Nag. 185 = 165 I.C. 350.

Sec. 115—*Compromise between rival shebait of idol if can create estoppel as against a succeeding shebait.*

A compromise in a suit between two rival shebait of an idol would create an estoppel as against them. But it cannot create an estoppel as against a succeeding shebait who questions the title of one of the prior rival shebait and sets up his own undisputed title as the lawfully created shebait. (*Mukherji & S. K. Ghosh JJ.*)

GOVINDA RAMANUJ DAS MOHUNT vs. MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326 = 164 I.C. 33.

Evidence Act—(Contd.)

Sec. 115—*Mutwali executing a mortgage of wakf property, if may subsequently question the validity of the mortgage.*

A mortgagee who executes a usufructuary mortgage of wakf property, cannot, after the document has been acted upon and possession transferred to the mortgagee and money received from him, bring a suit impugning the validity of the mortgage, being estopped from doing so by Sec. 115, Evidence Act (*Bennet & Bajpai JJ.*)

AFZAL HUSSEIN vs. CHHEDI LAL.

57 All. 727.

Sec. 115—*One of two sisters borrowing money to recover joint property—other sister, when benefiting from the loan, if can question the transaction.*

Where A & B, two sisters, are entitled to certain property in possession of a third person and A obtains a loan for instituting a suit to recover the property, the mere fact that B is also benefitted from the loan taken by her sister in that she obtains her share in the course of litigation which may have been partly financed from the money so borrowed is no reason for preventing her from questioning the transaction. (*Niamatullah & Allsop JJ.*)

CHATTAR SINGH vs. MST. HUKUM KUNWAR.

68 All. 391 = 1936 A.L.J. 395.

Sec. 115—*Persons consenting to act done, and inducing others to do that which otherwise they might have abstained from, if estopped from challenging act done.*

If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so far given faith to his words or to the fair inference to be drawn from his conduct. The doctrine is equally operative whether the case

Evidence Act—(Contd.)

is based on contract or on estoppel.
(*Courtney Terrell C. J. & Dhavle J.*)

JANKIRAM SITAL RAM FIRM vs. CHOTA-NAGPUR BANKING ASSOCIATION LTD.

15 Pat 751=17 P.L.T. 697=165 I.C. 98.

Sec. 115—Plaintiff representing himself to be a tenure-holder granting ryoti right to defendant—plaintiff if estopped later on from ejecting defendant on the allegation that plaintiff was a ryot and defendant an under-ryot under him.

The plaintiff representing himself to be a tenure-holder granted a ryoti right to the defendant. Subsequently, however, the plaintiff who was recorded as a ryot in the Record-of-Rights instituted an action in ejectment as against the defendant on the allegation that the latter was an under-ryot and did not vacate the land after the service of notice to quit. Held, that the plaintiff was estopped from entering into question as to whether he was a tenure-holder or a ryot. (*Courtney Terrell C. J. & Macpherson & Fazl Ali JJ.*)

DHANU PATHAK vs. SONA KORRI.

15 Pat 589=17 P.L.T. 380=162 I.C. 177.=A.I.R. 1936 Pat 417 F.B.)

Sec. 116—Tenant, if may question title of landlord who inducted him by saying he is benamdar for third party.

A tenant while in possession of the demised premises is estopped from pleading against the person who lets him into possession that the latter is the benamdar for a third party. 31 Mad. 461 & 26 M. L. J. 597 dissented from. (*R. C. Mitter J.*)

DINOBANDHU GAN vs. MAKIM SARDAR.

63 Cal. 763=164 I.C. 468=40 C.W.N. 460.=A.I.R. 1936 Cal. 93.

Sec. 116—Suit for ejectment—Lessee not denying landlord's title but denying contract of tenancy Sec. 116, if bars such denial.

Evidence Act—(Contd.)

There can be no estoppel on a point of law in a suit for ejectment of a lessee. If there is no denial on the part of the defendant of the landlord's title and the denial is merely of the existence of a contract of tenancy, Sec. 116 cannot bar such a denial. (*Vivian Bose. J.*)

MST. NASIBAN vs. MOHAMMED SAYAD.

19 N.L.J. 179=A.I.R. 1936 Nag. 174=164. I.C. 557.

Secs. 123 & 124—Right of Court to decide whether documents in the possession of a public officer are privileged.

Whether a document in the possession of a public officer is privileged or not is not for the public officer to decide. It is for the Court in the first instance to satisfy itself that the documents relate to State affairs or that its production will be detrimental to public interest. The privilege regarding the production of documents is a narrow one and the fact that their production is likely to prejudice the Crown's case is no reason for their non-production. (*Niyogi, A. J. C.*)

IBRAHIM SHERIFF YAZDANI vs. SECRETARY OF STATE & ORS.

161. I.C. 668=A.I.R. 1936 Nag. 25.

Sec. 145—Scope of the section.

Sec 145 of the Evidence Act. provides that the evidence of a witness may be contradicted by the production of a previous statement made in writing; but before such statements can be used to contradict his evidence his attention must be drawn specifically to the statements which are to be so used. (*James & Rowland JJ.*)

RAM KESHWAR DAS vs. BALDEO SING.

165 I.C. 805=17 P.L.T. 621.=A.I.R. 1936 Pat 588.

Sec. 167—Improper admission of evidence, if vitiates finding supportable on other evidence.

Evidence Act—(Contd.)

When a finding based partly on evidence the admissibility of which is questioned may in the opinion of the Court before which objection is taken up supported on other evidence, such finding may be upheld under Sec. 167 of the Evidence Act. (Sir John Wallis)

BHAGWAN BAKSHI SINGH vs. MAHESH SINGH.

40 C.W.N. 380-38 P.L.R. 177-38
Bom. L. R. 1, = 43 M. L. W. 7 = 1936
M.W.N. 15.

EXECUTION.

Appeal—Order disallowing plea of limitation raised during execution proceedings, if appealable.

Whenever a plea of limitation is raised in an execution petition and there is a finding thereon, the order is an appealable decree. Obviously, if the plea is allowed, it must be an appealable order; and similarly, if it is rejected it is an appealable decree. It must follow that it is an appealable 'decree' directly it has been pronounced. It is not right under those circumstances to wait until some other order is made in the execution petition, 64 M. L. J. 735 dissented from; 48 I. A. 45 followed; (Beasley C. J. & Stodart J.)

MUNNALURI RAMA RAO vs. TADIKOND SREERAMAMURTI.

71 M.L.J. 388-44 M.L.W. 486 = 1936
M.W.N. 575 = A.I.R. 1936 Mad. 801 =
164 I.C. 670.

Application for execution—application if can be filed after the judgment-debtor has applied for being adjudicated an insolvent.

An application for execution of a decree filed after the institution of insolvency proceedings against the judgment-debtor can not be entertained without the leave of the insolvency Court and where such leave has not been obtained the application is not in accordance with law. 68 M. L. J. 148 followed. (Burn & Menon JJ.)

JAGADISHAN PILLAI vs. NARAYAN CHETTIAR.

59 Mad. 759 = 1936 M.W.N. 364 = 70
M.L.J. 180 = 162 I.C. 376 = A.I.R. 1936
Mad. 284.

Execution—(Contd.)

Application for execution—properties situated outside jurisdiction of original Court—Application where should be made.

A decree holder has always a right to apply as of course to the Court which passed the decree for its execution even if it be in respect of the property outside the territorial jurisdiction of such Court and even its execution by such Court could be no more than execution by transmission to another Court. The Court which passed the decree will transmit the same to the Court where the immovable property sought to be sold is situate along with the other papers required by Or. 21, r. 5 or r. 7 of the Code, and then the latter Court will make the order for sale. It will not be necessary in such a case to have a fresh application for execution before the Court where the immovable property is sought to be sold. (S. K. Ghosh & Edgely JJ.)

AMARENDRA NATH MULLICK vs. BALAI CHAND GHATAK.

A.I.R. 1936 Cal. 267 = 162 I.C. 777.

Application for execution—failure to note time and place of verification, if a fatal defect.

In an application for execution, the omission to note the time and place of verification is a trivial defect and is not such as to invalidate the application. (Mohammed Noor & Saunders JJ.)

SHEONATH PRASAD vs. BENARES BANK LTD.

159 I.C. 494 = A.I.R. 1936 Pat. 62.

Application for execution—Death of judgment-debtor during execution—Proper procedure to be followed.

On the death of a judgment-debtor before an application for execution has been finally disposed of the proper course for the decree-holder is either to present a fresh application for execution against the legal representative or to continue the existing execution petition by making the legal representative a party to it. 34 Bom. 142 followed. (Cornish, Varadachair, Wards-

Execution—(Contd.)

worth, Venkatarama Row & Lakshmana Row JJ.)

KANCHAI MALAI PATHAR vs. SHAHAJI RAJAH SAHEB.

59 Mad. 461=1936 M.W. N. 60=70 M.L.J. 162=A.I.R. 1936 Mad. 205=162 I.C. 156.

Application for execution—Power of Court to whom decree has been transferred for execution to decide whether application for execution is barred by limitation or not.

A court to which a decree is transferred for execution has jurisdiction to decide whether the application for execution subsequently made to it is barred by limitation or not. But in considering the question of limitation such Court cannot look further back than the order transferring the decree of the Court which passed the decree, for an order transferring a decree is a step-in-aid of execution and consequently provides a starting point for a fresh period of limitation. 5 Rang. 775 followed. (*Dunkley J.*)

ARJUN DAS BISUMALAL vs. U KA YA.

14 Rang 550=163 I.C. 403=A.I.R. 1936 Rang 271.

Application for execution—Attachment before judgment—decree passed—fresh order of Court, if necessary for an application under Sec. 63, C. P. Code.

There is nothing in principle or authority to support the view that a person who has obtained an attachment before judgment cannot avail himself of Sec. 63, C. P. Code, till some order has been passed by the Court upon his application for execution. An attachment before judgment becomes an attachment in execution under Or. 38, r. 11, C. P. Code, as soon as a decree is passed, and therefore it is quite unnecessary that some order should be passed on the execution application by the Court to enable it to come within the provisions of Sec. 63, C. P. Code. (*Varadachariar & Stodart JJ.*)

KONCHEDU DALAYYA vs. SUNDARA NARAYANA vs. & ORS.

59 Mad. 303=43 M.L.W. 40=161 I.C. 93=A.I.R. 1936 Mad 91.

Execution—(Contd.)

Application for execution—application made to Court passing decree in respect of property situated outside its territorial jurisdiction—Application merely asking for issue of warrant of attachment such property—Application if effective to constitute fresh starting point of limitation.

It cannot be said that an application for execution made to the Court which passed the decree in respect of property situated outside its territorial jurisdiction is not made in accordance with law merely because instead of asking for transfer of the decree to the Court within whose jurisdiction the property is situate, the application ask for issue of a warrant of attachment to such property. The question is not whether the court has jurisdiction to execute the decree, but it has jurisdiction to entertain the application. (*Dunkley J.*)

ARJUN DAS BISUMALAL vs. U KA YA.

14 Rang 550=163 I.C. 403=A.I.R. 1936 Rang 271.

Application for execution—Dismissal of petition by first Court—High Court setting aside dismissal and directing execution to proceed against some judgment debtors—fresh execution petition, if necessary.

Where an execution petition is dismissed by the Subordinate Judge, but the order of dismissal is set aside on appeal by the High Court, the execution proceedings must be considered to have been received by the order of the High Court, and fresh execution petition is therefore necessary. (*Fazl Ali & Luby J.*)

RAM PROSHAD SINGH vs. BENI MADHAB SINGH.

A.I.R. 1936 Pat. 26=160 I.C. 675.

Decree—Transfer of—certificate need not be signed by judge who passed it.

The order transmitting a decree for execution was signed by the Registrar of the High Court. The judgment debtor contended that it should have been signed by the

Execution—(Contd.)

judge who passed the decree, *Held*, the objection had no force. (*Jai Lal J.*)

SHIV BUKHTAWAR LAL vs. KANGA,

38 P.L.R. 1101=A.I.R. 1936 Lah. 369=162 I.C. 489.

Decree—Decree against estate of deceased—Income accruing after death, if liable to attachment and sale.

Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed, is liable for the satisfaction of the decree, then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decrees. 2 Luck 408 & 47 Mad. 411 followed. (*Jailal J.*)

MANZUR HUSSAIN vs. RAMRATAN SHAH RAJMAL FIRM.

A.I.R. 1936 Lah. 236=165 I.C. 802.

Decree—Rent decree against Hindu widow, if may be executed against reversioners who take an estate on surrender undertaking to pay decretal dues.

When under a contract of surrender between the last surviving of three Hindu daughters and the next reversioners, the latter take the estate on undertaking to pay the dues under rent decrees obtained against the daughters and their debts, the decree-holder though a stranger to the contract, can, without recourse to a separate suit enforce the liability in execution and proceed against the estate in the hands of the reversioners, even if they may have divided it up between themselves with the consent of the widow, and even if the particular property for the rent of which the decree was obtained may have already been sold off. 23 Cal. 454 followed. (*Guha & Bartley JJ.*)

BHUIJENDRA NATH BISWAS vs. SUSHAMOYI BASU.

40 C.W.N. 601=63 C.L.J. 25=A.I.R. 1936, Cal 67.

Executing Court—Decree passed without jurisdiction, if binding on executing Court.

Execution—(Contd.)

A decree passed without jurisdiction, is, nevertheless binding on the executing Court, unless it is set aside by recourse to proper procedure. (*Jai Lal, J.*)

COMMITTEE OF MANAGEMENT BOR GURDWARAS, AMRITSAR vs. CENTRAL BANK OF INDIA, LTD.

A.I.R. 1936 Lah. 766.

Executing Court—Power to refuse execution on the ground that judgment-debtor will not have any land left for his maintenance.

The executing Court has no jurisdiction to refuse an application by a decree-holder for leasing out of the land of the judgment-debtor for effecting satisfaction of the decree on the ground that the land left with the judgment debtor after the leasing out would not be sufficient for his maintenance. (*Bhide, J.*)

CERDIT SINGH vs. SHER KHAN.

35 P. L. R. 608=A. I. R. 1936 Lah. 448.=164 I.C. 30.

Executing Court—Power to distribute assets pro-rata when parties not entitled to claim rateable distribution.

Where the parties are not entitled to claim rateable distribution under Sec. 73, C. P. Code on the ground that no application for execution had been made before the date of receipt of the assets but the attachments had been made at the instance of some of the creditors, the attachments did not create any lien in favour of any of them, and the Court holding the assets can divide the same amongst all of them pro-rata. 41 Cal. 1072 relied on. (*R. C. Mitter, J.*)

KUSUM KUMARI DEBI vs. GAYANATH PARAMANIK.

A.I.R. 1936 Cal. 390.

Executing Court—Award under Co-operative Societies Act—Executing Court if may question validity.

It is a well established rule that an executing Court has no jurisdiction to

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question the validity of the decree sought to be executed. The same rule has been held to apply to awards under the Co-operative Societies Act. (*Bhide, J.*)

**ABDUL AZIZ vs. ANJUMAN IMDAD
BAHAMI KARZA.**

38 P.L.R. 698 = A.I.R. 1936 Lah. 442,
163, I.C. 278.

Executing Court—Death of judgment-debtor—Jurisdiction to continue execution proceedings after death of judgment-debtor.

If the correct juristic principle is that the dead man is no person in the eye of the law and on the death of the judgment-debtor, the liability of paying his debts devolves on his legal representative, whether on decree or otherwise, the Court cannot regain the jurisdiction which it has lost till the representative is impleaded and made the judgment-debtor, and the property which became his, cannot be sold and no right thereto would pass to the auction-purchaser. 47 Mad. 63 overruled; 25 Bom. 337 explained, 12 All. 440 doubted. (*Cornish, Varadachariar, Wadsworth, Venkataramama Row & Lakshmana Rao, JJ.*)

**KANCHAI MALAI PATHAR vs. RY.
SHAHAJI RAJAH SAHEB & ORS.**

59 Mad. 461 = A.I.R. 1936 Mad. 205
162 I.C. 156 = 1936 M.W.N. 60 = 70
M.L.J. 162.

Executing Court—Decree against several judgment debtors, if can be executed against one of them—executing Court, if can go behind the decree.

When a decree as it stands, is against several defendants, it can be executed against each of them personally and against his property, whatever the nature of it, and it is not open to the executing Court to go behind the decree to find out what interpretation should be placed on its wording. (*Addison & Din Mohammed, JJ.*)

**GANESH DAS vs. HARI CHAND &
ANR.**

17 Lah. 187 = 38 P.L.R. 430 = 164 I.C.
378 = A.I.R. 1936 Lah. 704.

Execution—(Contd.)

Executing Court—Simultaneous execution by different methods when may be allowed—court's power to refuse execution against judgment-debtor's person.

There are cases in which simultaneous execution by two or more methods are reasonable and feasible. But where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than of a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor. (*Macpherson & Mohammad Noor, JJ.*)

ADITYA PRASAD vs. ISWAR SINGH.

A.I.R. 1936 Pat. 28 = 160 I.C. 685.

Executing Court—Land belonging to judgment debtor leased out—lessee directed to pay lease money by instalments—failure of some instalments—court, if can direct lessee to deposit whole balance in Court.

In execution of a decree, the Court leased out the lands of the judgment debtor to a certain person and directed the lease money to be paid in certain instalments. On the lessee failing to pay some instalments, the Court passed an order requiring him to deposit the balance of the lease money in court. Held, that the order was not illegal or without jurisdiction and the Court could enforce payment of the lease money by applying the provisions of the C. P. Code relating to the executing of decrees. (*Addison & Abdul Rashid, JJ.*)

**PUNJAB NATIONAL BANK LTD., vs.
SHAMSHER SINGH & ANR.**

38 P.L.R. 930 = A.I.R. 1936 Lah. 696.

Execution proceedings—Application under Sch. 2 para. 20, C. P. Code—value for the purposes of jurisdiction fixed—valuation, if can be questioned in execution proceedings.

Where in an application under Sch. 2, para. 20, C. P. Code, the value for the purposes of jurisdiction is fixed, the valuation cannot be questioned in execution proceedings when no objection was taken in the proceedings under Sch. 2, para. 20,

Execution—(Contd.)

C. P. Code or in an appeal arising therefrom. 36 P. L. R. 293 relied on. (*Bhida J.*)

BASANT DEVI vs. AMIN CHAND & ANR.

A.I.R. 1936 Lah. 63.

Execution proceedings—Suit on mortgage—person who had previously attached the mortgaged property in execution of a money decree, impleaded as a party—on his death his legal representatives impleaded as judgment debtors in proceedings—validity of the procedure.

In a suit on a mortgage, a person who previously attached the mortgaged property was impleaded as a party. On his dying during the pendency of the suit no steps were taken to bring his legal representatives on record, but in the execution proceedings, it was sought to implead them as judgment-debtors. *Held*, that they were not liable to be so impleaded and were entitled to be discharged. (*Agarwala & Varma, JJ.*)

DULAR CHAND RAM & ORS. vs. KAMAKHYA NARAIN SINGH.

159 I.C. 1073=A.I.R. 1936 Pat. 110.

Execution proceedings—Decree under execution amended—amendment rendering execution incompetent against some defendants—Decree-holder not moving against such defendants but execution proceedings on basis of original decree continued—effect of.

A decree-holder applied for execution of a decree against the defendants on the record and prayed to sell the properties of the defendants. During the pendency of the execution the decree was amended by expunging some of the judgment-debtors from the records. The decree-holder without starting execution afresh continued proceedings on the original decree without taking any action against such defendants. *Held*, that, the error committed by the decree-holder was not one of substance but of form, and legality of the execution pro-

Evidenece - (Contd.)

ceedings should not be allowed to be affected by it. (*Fazl Ali & Luby, JJ.*)

RAM PERSHAD SINGH vs. BENI MADHAB SINGH.

A.I.R. 1936 Pat. 26=160 I.C. 678.

Execution proceedings—Property of judgment debtors (father and his children) purchased by decree-holder in full satisfaction of his money decree—sons suing and getting their share exonerated—decree-holder, if can revive execution proceedings to secure unrealised portion of decretal amount.

Where the decree holder, in execution of his money decree, purchased the properties of the judgment debtors (father and his sons) in full satisfaction of his decree, but the sons later had their shares exonerated by obtaining a declaration that the decree was not binding upon them, and the decree-holder thereupon applied for revival of execution proceedings for the purpose of realising the unpaid amount of the decree, *held*, that as the decree had already been satisfied, it was not open to the decree-holder to take out further execution of the decree. It was immaterial that in his capacity as auction purchaser he had purchased the property of someone who was not liable under the decree. 50 Mad, 639 followed. (*Courtney Terrell & Varma, JJ.*)

P'BULCHAND RAM MARWARI vs. NAURANRI LALL MARWARI.

16 P.L.T. 906=164, I.C. 1073.

Execution proceedings—Guardian-ad-litem appointed by Court—decree against minor if can be challenged in execution proceedings on the ground of adverse interest of such guardian.

The appointment of guardian ad litem is made in the exercise of judicial discretion and the order of appointment amounts therefore to an implied finding that the guardian's interest is not adverse to that of the minor. The validity of a decree passed against a minor cannot therefore be challenged in execution proceedings on the ground that the interest of the guardian-ad-litem was adverse to that of the minor. 60 Cal.

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670 explained; 9 Rang. 490 relied on.
(Venkatasubba Rao & Menon, JJ.)

KRISHNAMURTHI vs. IMPERIAL BANK OF INDIA, RAJAHMUNDRY.

59 Mad 642=71 M.L.J. 209=A.I.R. 1936 Mad. 618=164 I.C. 472=1936 M.W.N. 561.

Jurisdiction—Judgment-debtor not objecting to jurisdiction during trial, if precluded from raising objection to delivery of possession in execution of decree against him.

The omission by a judgment debtor to take an objection as to jurisdiction of Court to pass a decree in a mortgage-suit during trial or before the preliminary decree for sale is made absolute, does not preclude him from raising an objection to delivery of possession of a property in execution of the decree passed against him on the ground that the Court which passed the decree and held the sale had no inherent jurisdiction to entertain the suit. (Subhedar, Neogi & Staples A. C. J.)

MURLIDHAR SRINIVAS vs. GORAKH-RAM SADHURAM.

31. N.L.R. (Supp) 57=161 I.C. 877=A.I.R. 1936 Nag. 1.

Limitation—Application to Court passing decree to execute it in respect of property situated outside its territorial jurisdiction—Such application if gives a fresh starting point for limitation.

An application made to a Court passing a decree to execute it in respect of property situated outside its territorial jurisdiction is an application made to a proper court and is in accordance with law. Such an application is effective to give a fresh starting point of limitation although the Court to which the application is made has no jurisdiction to carry on such execution. (Dunkley, J.)

ARJUN DAS BISUMALAL vs. U KA YA.

14 Rang. 350=163. I.C. 403=A.I.R. 1936 Rang. 271.

Execution—(Contd.)

Sale—Objection as to saleability of property when should be taken.

An objection that the property sold in execution of a decree is not liable to attachment and sale must be raised at an early stage of the proceedings. It is not correct to say that if the delay in taking the objection can be satisfactorily explained, the judgment-debtor should be allowed to raise the plea at any stage of the proceedings. (Vivian Bose, J.)

MST. LAXMI BAI vs. SEWAKRAM.

19 N.L.J. 129.

Sale—Sale being held before the expiry of 30 days, if a material defect.

The fact of a sale being held before the period of 30 days has elapsed although a material irregularity does not make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. 20 Cal. 66 followed.

HARO SINGH vs. LABH SINGH.

161 I.C. 216.

Sale—Sale by Court auction—price fixed lower than sale by private contract—effect of.

It is a fact that the properties sold at a Court sale do not, as a rule, fetch the same price as they might fetch at a sale arranged by private contract. Therefore the price obtained in a Court sale should not be considered to be grossly inadequate on the ground that it is lower than what might have been obtained at sale by private contract. (Fazl Ali & Luby, JJ.)

RAM PARSHAD vs. BENI MADHAB SINGH.

A.I.R. 1936 Pat. 26=160 I.C. 678.

Sale—Right to shares in deities' service, if may be sold in execution.

"Palas" or shares in the worship of a deity may be sold in a Court's sale so long as the class of person to whom the sale is made is a class of person entitled to perform the

Execution—(Contd.)

services of the deity. (*Courtney Terrell, C. J. & Dhavle J.*)

RAMSHARAN PANDE vs. ISWAR PANDE.

17 P.L.T. 76=A.I.R. 1936 Pat. 10
=160 I.C. 355.

Sale—Judgment debtor inducing decree-holder to agree to postponement of sale, if can raise objection to execution.

Where the judgment debtors induced the decree-holders to agree to a postponement of the sale to enable them to pay up the decretal amount, held, they could not be allowed to turn round afterwards and put in a fresh application objecting to the execution proceedings. (*Henderson & Khundkar JJ.*)

FATEH KUMAR SINGH vs. KISSEN CHAND KACHAR.

160 I.C. 86.

Sale—Properties sold in execution of decree—before confirmation of sale, judgment-debtor declared to be an agriculturist—Confirmation, if can be refused.

Once a sale has taken place, the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. A sale in execution of a decree cannot be set aside on the ground that the judgment-debtor has since been declared to be a member of an agricultural tribe whose land cannot be sold, where such declaration has been made more than 30 days after the date of the sale. (*Jailal, J.*)

ABDUL RAHIM vs. ABDUL HAQ.

A.I.R. 1936 Lah. 191=161. I.C. 752.

Sale—Judgement debtor hypothecating property for payment of decretal sum—default in payment—hypothecated property, if may be sold in execution without recourse to fresh suit.

A decree provided that the decretal amount was to be paid in annual instalments provided that the judgment debtor filed in Court within one month a registered security bond hypothecating certain property as

Execution—(Contd.)

security for the realisation of the decretal debt. The defendants complied with the conditions and filed the security bond hypothecating their property for the satisfaction of the decree. The judgment-debtor making default in payment of the decretal sum, the decree-holder applied for sale of the hypothecated property. Held, that the hypothecated property could be proceeded against in execution of the decree itself without having recourse to a separate suit. 46 I.A. 228 followed. (*Muhammad Noor & Varma, JJ.*)

NAROTTAM DAS vs. KRISHNA PRASAD.

15 Pat. 543=17 Pat. L.T. 434=
A.I.R. 1936 Pat. 289=162 I.C. 830.

Sale—Sale of immovable property in which judgment-debtor has no interest at the date of the sale—decree-holder, if entitled to revive execution proceedings.

A decree-holder who purchases immovable property in execution of his decree cannot, if it subsequently appears that the judgment-debtor had no interest in the property at the date of the sale, successfully maintain an application for the revival of the execution proceeding on the ground that his decree had not in fact been satisfied. His first duty in such circumstances is to have the sale set aside by applying under Or. 21, r. 91, C. P. Code. (*Courtney Terrell C. J., Dhavle & Agarwala, JJ.*)

SURENDRA KUMAR SINGH vs. SRICHAND MAHATA & ORS.

15, Pat. 308=16 P.L.T. 908=160.
I.C. 1049=A.I.R. 1936 Pat. 97.

Sale—Person whose property is sold in execution and who takes no step provided by the law, if can question, the validity of the sale later on.

The Civil Procedure Code provides remedies for a person whose property is in danger of being wrongfully sold on a decree by which he is not bound. If he fails to avail himself of those remedies, he cannot after the sale, plead that the proceedings, though he was a party to them, are not binding on him. A sale held by the Court cannot be treated as a nullity unless the

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Court lacked jurisdiction to make the sale or unless the sale was vitiated by any irregularity. 23 Bom 337 relied on. (*Rowland, J.*)

BHAGLU MAHTO vs RAMAUAH SHAH.

17 P. L.T. 832 = A.I.R. 1936 Pat. 442.
164, I.C. 178.

Sale—Rights of auction purchaser.

When a property is sold by Court auction in execution of a decree, the auction purchaser can only acquire the right, title and interest of the judgment-debtor in the property and nothing more. (*Agha Haidar, J.J.*)

BABURAM vs. BASHESWA DASS.

38 P.L.R. 539.

Sale—Rights of the auction-purchaser—Auction purchaser, if can insist on confirmation of sale.

All observations in the C. P. Code about the rights of auction-purchasers have expressly or impliedly been made subject to conditions relating to the jurisdiction of the Court in respect of decree or sale as the case may be. In the period anterior to the confirmation of sale, an auction-purchaser has nothing of an "absolute" right to insist on the sale being confirmed. (*Cornish, Varadachariar, Wadsworth Venkataramana Rao & Lakshmana Rao, J.J.*)

KANCHA MALAI PATHAR vs. SHAHAJI RAJAH SAHEB & ORS.

59 Mad. 461 = 162 I.C. 156 = A.I.R. 1936. Mad. 205 = 1936 M.W.N. 60 = 70, M.L.J. 162.

Sale—Auction purchaser if a representative of the judgment-debtor.

The auction purchaser cannot be looked upon as the successor-in-interest of the decree-holder in any sense. He is the representative of the judgment-debtor. 6 Lah. 544 followed. (*Addition & Sale, J.J.*)

NARAIN SINGH & BNR. vs. WARJUM SINGH & ORS.

38 R. 790 = A.I.R. 1936 Lah. 18.

FATAL ACCIDENTS ACT (XIII OF 1853.)

Sec. 1—Death caused by motor accident—Right of heirs of deceased to claim damages.

In a suit by the heirs of a person dying as the result of a motor accident for recovery of damages under the Fatal Accidents Act, it was found that the deceased had been guilty of negligence. *Held*, that the heirs were entitled to claim damages only if it could be proved that the fact of the deceased's negligence could have been avoided by the exercise of reasonable care on the part of the driver of the vehicle. (*Page, C. J., & Ba U, J.*)

SAGHIRUL HASSEN BEG vs. RANGOON ELECTRIC TRAMWAY & SUPPLY CO. LTD.

A.I.R. 1936 Rang. 295 = 163 I.C. 957.

Sec. 3—Compensation payable under the Act—rule for assessment thereof.

In awarding compensation under the Fatal Accidents Act, the rule to be observed is that the damages must be fixed solely with reference to the pecuniary loss sustained by the relatives of the deceased in respect of past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. The plaintiff must adduce evidence affording a reasonable basis for the ascertainment of the pecuniary loss so inflicted (*Cornish & Varadachariar, J.J.*)

STANES MOTORS, LTD. vs. VINCENT PETER.

59 Mad. 402 = 1936 M.W.N. 543 = 70 M.L.J. 155 = A.I.R. 1936 Mad. 247 = 161 I.C. 192.

FISHERY.

Right of a grantee of fishery right in a navigable river to follow the shifting river for the enjoyment of his exclusive fishery.

The grantees of the fishery right in a navigable river has the right to follow the shifting river for the enjoyment of his exclusive fishery so long as the waters may be considered a part of the river system, including in that expression such adjuncts of the river as are in communication with it, not occasional or seasonal, but continuous, or at least of such a permanent character

Fishery—(Contd.)

as would establish the identity of the waters as part of the river system. 42 Cal. 389 & 17 C. W. N. 1173 referred to. (*Mukherji & S. K. Ghosh JJ.*)

JNANENDRA MOHAN BHADURI vs.
RANJIT PAL CHOWDHURY.

63 Cal. 351.

FIXTURES.

Person building house on land belonging to another—Rights of.

The principle of English Law that what is attached to the soil, belongs to the owner is not part of the law in India. Therefore a house built on land belonging to another does not become attached to the land in such a way as to go with the land, and belongs to the person who is entitled to remove the materials of the house but only so far as he is able to do so without appreciably damaging the soil or making the land less fit than it was before, for use as a building site. (*Baguley & Mackney, JJ.*)

MAUNG BA U vs. BAILIFF OF
DISTRICT COURT, HANTHAWADDI.

161 I.C. 659=A.I.R. 1936 Rang. 68.

FRAUD.

Perpetrator of fraud, if can, on the purpose of the fraud being defeated, recover property fraudulently transferred.

Where the purpose of the fraud is not only not effected, but in fact is defeated, there is nothing to prevent the person trying to perpetrate the fraud from repudiating the whole transaction, revoking all authority of the confederates to carry out the fraudulent scheme and recovering all property fraudulently transferred. Where however the contemplated fraud has been effected wholly or in part, the fraudulent grantor loses his right to claim the aid of the law in recovering the property. 35 M. L. J. 484 & 46 M. L. J. 298 overruled. (*Beasley C. J., King & Gentle, JJ.*)

VENKATARAMAYYA vs. PULLAYA

71 M.L.J. 458=44 M.L.W. 294=1938
M.W.N. 676=1649 I.C. 588=A.I.R. 1936
Mad. 717=164 I.C. 588.

Fraud—(Contd.)

Transfer with intention to defraud creditor—transferor continuing in possession, but later dispossessed—transferor, if can recover possession.

Where a person fictitiously transfers property to another for the purpose of defrauding his creditors, but continues in possessing of the property after the transfer, till he is illegally ousted by the transferee under the shadow of the fraudulent deed, the transferor can recover possession from the transferee, who will not be permitted to maintain his possession under the fraudulent transfer, 35 Cal. 967 & 4 Rang. 429 relied on. (*Ba U, J.*)

HAFIZULLA KHAN vs. LILLY MULLA
KHAN.

164 I.C. 914=A.I.R. 1936 Rang. 405.

Fraudulent sale to prevent right of pre-emption—suit by the heirs of the vendee in the fictitious sale deed to recover possession—maintainability of the suit.

A, who was not a co-sharer in the village purchased certain property, and in order to defeat a claim for pre-emption by B, executed a fictitious sale deed in favour of C, who was a co-sharer. The fraud succeeded and a suit for pre-emption by B was dismissed. The property however continued to be in possession of A. C's heir brought a suit for recovery of the property on the basis of the sale deed. Held, that A was not debarred from showing that the sale deed was fraudulently executed, and that C was a party to the fraud. Both parties being in *pari delicto*, the Court should decline to help either party and the suit should fail. (*Sulaiman C. J. & Bennet J.*)

NAWAB SINGH vs. DALJIT SINGH.

1936 A.W.R. 291=1936 A.L.J. 285=
162 I.C. 958=A.I.R. 1936 AH. 492.

GIFT.

Land given to charitable body for specific purpose—Purpose rendered impossible—Validity of the gift.

Where a land is given to a charitable body for a specific purpose, then such gift becomes a nullity if the performance of

Gift—(Contd.)

that purpose is rendered impossible. Such a gift is a conditional one. It becomes a good charitable gift upon the condition being fulfilled. If the performance of the condition is rendered impossible the gift never really takes place. (*Harris & Rachhpal Singh JJ.*)

HARISH CH. vs. HINDU DHARMA SHEVAK MANDAL.

A.I.R. 1936 All. 197.

Gift to wife as provision for future maintenance, if can be impeached when donor not shown to be in debt at the time of the gift.

The gift by a husband to his wife as a provision for her future maintenance cannot be impeached and held to be a transfer made with intent to defeat or delay creditors, where the donor is not shown to have been in debts or in embarrassed circumstances at the time the gift was made, and all the debts were incurred at a later date. (*Coldstream & Abdul Rashid, JJ.*)

MT. BIBO vs. SAMPURAN SINGH.

162 I.C. 922 = A.I.R. 1936 Lah. 222.

Gift in favour of Takia—descendants of donor, if can interfere with the use of the gifted land by the donee.

The plaintiffs sued for a permanent injunction for restraining the defendants from erecting a mosque on part of a land which the plaintiffs alleged their ancestors had created a trust in favour of a Takia for the benefit of way-farers belonging to all castes and creeds. Held, that the land having been gifted to the Takia absolutely, the plaintiffs were not entitled even as the descendants of the original donors, to claim the reliefs prayed for, because the gift completely divested the original donor of his rights which could not be regained or revived in any circumstances. (*Addison & Din Mohammad JJ.*)

JANI vs. BISHAN SINGH.

38 P.L.R. 349 = 161 I.C. 173.

GENERAL CLAUSES ACT (X OF 1897.)

Sec. 3 (52)—Signature, if includes seal.

A seal cannot be regarded as a signature within the definition contained in the General Clauses Act. (*Nanavutty & Smith JJ.*)

SRI PROSAD vs. SPECIAL MANAGER, COURT OF WARDS. BALRAMPUR.

1936 O.W.N. 76 = 164 C. 494.

Sec. 3 (52)—Seal—meaning of—seal if can be regarded as a signature.

Under the General Clauses Act, the word "signed" includes mark with reference to a person who is unable to write his name, S. 90 of the Evidence Act, makes no provision for any presumption in regard to seals, nor can a seal be regarded as a signature under the definition contained in the General Clauses Act. (*Srivastava & Nanavutty JJ.*)

SPECIAL MANAGER, COURT OF WARDS, BALARAMPUR vs. TRIVENI PROSAD.

11 Luck. 36.

Sec. 8—Re-enactment of repealed Act—Acts referred to in that Act and repealed should be re-enacted.

Where any Act of the Governor General in Council made after the commencement of this Act repeals and re-enacts with or without modification any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as reference to the provisions so re-enacted. (*Jai Lal J.*)

MST. KALAWATI vs. MST. SURLA.

161 I.C. 219 = 38 P.L.R. 398.

GOVERNMENT OF INDIA ACT (1919).

Sec. 65 (1) (e) & Sec. 80—A (1)—Laws—if always general or may relate to particular individuals.

Government of India Act—(Contd.)

Sec. 65 (1) (c) cannot be construed to mean that the laws are to be general laws for all persons for all Courts and for all places and things. There may be rules of law in concrete cases as well. (*Mukherji & S. K. Ghosh JJ.*)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB & ORS.

A.I.R. 1936 Cal. 593.

Sec. 80 (3)—Provincial government's power to consider law relating to Central subjects,

Sub-Section (3) of Sec. 80 should be so interpreted as to mean that the local legislature of a province if it makes or takes into consideration any law regulating a central subject may not do so without the previous sanction of the Governor General. (*Mukherji & S. K. Ghosh JJ.*)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB.

A.I.R. 1936 Cal. 593.

Sec. 80 A. (3)—'Regulate'—meaning of.

The word 'regulate' does not mean 'enact' but means 'adjust'. (*Mukherji & S. K. Ghosh JJ.*)

DEBENDRA NARAIN ROY vs. JOGENDRA NARAIN DEB & ORS.

A.I.R. 1936 Cal. 593.

Sec. 84—Power of provincial legislature to pass law affecting prerogative of the Crown.

The language of Sec. 84 of the Government of India Act (5 & 6, Geo. V, Cl. 61) as a whole, its position in the Act, and the marginal note to that section taken in conjunction with the amending Act (6 Geo. V, Cl. 37), have the effect of validating not only future Acts of legislative authorities in India, but also past Acts which affect the prerogatives of the Crown. The City of Bombay Municipal Act, 188, cannot therefore be said to be invalid merely by reason of the fact that it affects the prerogative of

Government of India Act—(Contd.)

the Crown. (*Beaumont C. J. & Rangnekar J.*)

SECRETARY OF STATE vs. MUNICIPAL CORPORATION OF THE CITY OF BOMBAY.

59 Bom. 681.

GOVERNMENT OF INDIA ACT (5 & 6 Geo. V Ch. 61)

Sec. 106 (2)—High Court's jurisdiction to issue writ of certiorari, when barred.

The High Court has no jurisdiction to issue a writ of certiorari in matters concerning revenue or collection thereof. (*Venkata ramana Rao J.*)

THYAGARAJA CHETTIAR vs. COLLECTOR OF MADURA.

59 Mad. 702=70 M.L.J. 343=1936

M.W.N. 55=43 M.L.W. 396=A.I.R.

1036 Mad. 398=163 I.C. 60.

Sec. 107—High Court, if can interfere with the order of a subordinate Court on the ground of an error of law or of fact.

The power of superintendence conferred on the High Court under Sec. 107, Government of India Act, does not authorise that Court to interfere with or set right the order of a subordinate Court on the ground that such order had proceeded on an error of law or an error of fact. (*Sulaiman C. J. Niamatullah & Bachopal Singh JJ.*)

MUKUND LAL vs. GAYA PRASAD.

57 All. 977.

GRANT.

Right claimed by prescription or lost grant—Essentials.

In order to acquire a right by prescription or under a lost grant, it is necessary to show, (1) that the origin of the right was legal, (2) that the right had been enjoyed openly, peaceably and uninterruptedly: and (3) that the right was valid and enforceable against all. (*Sulaiman C. J., Bajpai & Ganganath, JJ.*)

GOURI SHANKAR vs. HEMANTA KUMARI DEVI.

1936 A.W.R. 266=1936 A.L.J. 223=

162. I.C. 512=A.I.R. 1936. All. 301. (F.B.)

Grant—(Contd.)

Construction—Grant to daughter on death of last surviving widow and failing former, to next heirs—Meaning of.

The terms of a grant were the following:—"The estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participation and enjoyment of the estate in question, by the other widows—her co-heirs. On the death of the surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any, will inherit the property."

Held—(1) that under the grant there was no gift in favour of the daughter until the last surviving widow, and no right vested in her until she survived that period; that the words "or failing her" meant ~~failing~~ survivance at the death of the last surviving widow, and "next heirs" meant nearest heirs at the time when the succession opened on the death of the last surviving widow; and (2) that the daughter on survivance, would come in as the named heir and the preceding gift to her did not affect the legal order of succession as denoted by the words "next heirs." (*Lord Thankerton.*)

CHOTA RAJA SAHIB MOHITAI vs. SUNDARAM AYYAR.

63 I.A. 633=59 Mad. 630=71 M.L.J. 41=1936 M.W.N. 649=43 M.L.W. 734=40 C.W.N. 737=63 C.L.J. 504=38 Bom. L.R. 672=161 I.C. 888=A.I.R. 1936 P.C. 131.

Dedication to public—No appointment of any manager or mutwali—Suit by heir of original donor to effectuate an intention of grantor—Maintainability.

Where there is no other manager or mutwali of a grant dedicated to the public, the heir of the original donor is entitled to maintain a suit, to object of which is not to resume the grant but to effectuate the intention of the grantor by preserving the property to the uses for which he dedicated it to the public.

Grant—(Contd.)

(*Sulaiman C. J. Bajpai & Ganganath JJ.*)

GOURI SANKAR vs. MAHARANI HEMANTA KUMARI DEVI.

1936 A.W.R. 266=1936 A.L.J. 223. 161. I.C. 512=A.I.R. 1936 All. 301 (F.B.)

Ghat—Ghatia, if can claim right of exclusive possession over any portion of ghat by long user or custom.

A Ghatia cannot claim by custom or by long user a right to exclusive possession over any portion of the ghat or to put in takhta and fix canopies or railings by digging holes in the pavements. But at the same time, a person as heir of the original donor of the ghat, is not entitled to any injunction against the ghatias preventing them from acting as ghatias on the ghat, and in course of attending to the pilgrims either standing on the ghat, remaining there, or sitting at the ghat, or to any decree of ejectment against them. (*Sulaiman C. J., Bajpai & Ganganath JJ.*)

GOURI SANKAR vs. HEMANTA KUMARI DEVI.

1936 A.W.R. 266=1936 A.L.J. 223. 162 I.C. 512=A.I.R. 1936 All. 301 (F.B.)

Sec. 7—Certificate of guardianship—Guardian appointed under a will—Probate of Will, if necessary,

It is incumbent on a person who has been appointed guardian of a minor under a Will to take out probate as a condition precedent to his obtaining a certificate of guardianship under the provisions of the Guardian and Wards Act, 1890, 19 Bom. 832 and 40 Cal. 953 relied on. (*Collister & Bajpai, JJ.*)

GANESHI PANDE & ORS. vs. MT. BHAGIRATHI.

1936 A.W.R. 344=1936 A.L.J. 331=A.I.R. 1936 All. 368=163 I.C. 242.

GUARDIAN & WARDS ACT (VIII OF 1890)

Secs. 19 & 25—Right of father to act as guardian of his infant child.

Guardian & Wards Act—(Contd.)

If a father has had the care and custody of his infant child he will be a "guardian" as defined in the Guardian and Wards Act, and the provisions of Secs. 24 & 25 of the Act may then apply to him. But that is not the case when he has not had the custody of his infant child. Sec. 25 cannot apply in such case where the ward has always been in the custody of his mother. (*Baguley & Mackney JJ.*)

MANNU ALI vs. HAWABI.

161 I.C. 632 = A.I.R. 1936. Rang. 63.

Sec. 25—"Removal"—Meaning of—Refusal to hand over minor to person having constructive custody, if amounts to removal.

In order to render the provisions of Sec. 25, Guardian & Wards Act applicable and in order to prevent it being ineffectual in cases where reasons demand that it should operate, the words of the section must bear a more liberal interpretation than they are entitled to. When a person who has the actual custody of a minor refuses to hand over the said minor to the person who has the constructive custody and a lawful right to actual custody, then there has been removal within the meaning of Sec. 25 of the Act, 25 A. L. J. 585, 39 Mad. 608 relied on. (*Collister J.*)

SHEO KUMARI vs. MATHURAM RAM.

1936 A.W.R. 183 = 1936 A.L.J. 211 = A.I.R. 1936 A. 267. = 163 I. C. 816

Sec. 25—Husband obtaining decree for restitution of conjugal rights—custody of wife not possible in execution of decree—custody, if can be given in an application under Sec 25,

Where a husband obtains a decree for restitution of conjugal rights his wife who has never lived with him, but he is unable to obtain custody of his wife in execution of his decree, it is not open to him to achieve his object by making an application under the provisions of Sec. 25, Guardians and

Guardian and Wards Act—(Contd.)

Wards Act, (*Sulaiman C. J. & Rachpal Singh J.*)

MST, SHEO KUMARI vs. MATHURA RAM.

1936 A.W.R. 767 = 1936 A.L.J. 935
164 I.C. 915 = A.I.R. 1936 All. 657.

Sec. 25 (1)—Order for return of ward to guardian, when can be made,

Before a Court can pass an order under Sec. 25 (a), Guardians & Wards Act for the arrest and delivery of a ward to his or her guardian, it must be satisfied that such order is for the welfare of the child. Therefore, where an order for the arrest and delivery of a minor girl to her husband was made in 1932, but no steps were taken to enforce this order till 1935, held, that the order could not be enforced after such a length of time, because on the stale order of 1932, the Court could not assume in 1935 that it was for the welfare of the minor to return to her husband. (*Cornish J.*)

VENKAYAMMA vs. SURAYYA.

71 M.L.J. 1936 = 43 M.L.W. 850 = 1936 M.W.N. 414 = 163 I.C. 88.

Secs. 29, 32, 33, & 34—Guardian borrowing money under Court's order—creditor if bound to enquire into necessity of loan,

When an order by the Court has been made authorising the guardian of an infant to raise a loan on account of the minor, the lender of the money is entitled to trust to that order, and he is not bound to enquire as to the expediency or necessity of the loan for the benefit of the infant's estate. It does not matter whether the loan was raised on the security of the minor's property or on a simple money bond. 11 Cal. 379 relied on; 11 Bom. 351 & 42 Mad. 185 distinguished. (*Thom & Bajpai JJ.*)

BENARES BANK LTD. vs. DIPCHAND.

1936 A.W.R. 87 = 1936 A.L.J. 815
= A.I.R. 1936 All. 172 = 160 I.C. 64

Guardians and Wards Act—(Contd.)

Secs. 34 (c) (d) & 41—Application by minor on attaining majority for directing guardian to render accounts—order that can be passed.

Where a minor on attaining majority applies that the guardian be directed to render accounts, the only direction which the District Judge can give is to order the guardian to deliver any property in his possession or control belonging to the ward or any account in his possession or control relating to any past or present property of the ward. (*Collister & Bapnai JJ.*)

RANGANATH vs. MURARI LAL.

1936 A.W.R. 100=1936 A.L.J. 16=
A.I.R. 1936 All 179.=161 I.C. 493 1229

Sec. 34 (d)—Power of Court to record finding as to exact amount due from guardian.

Where an application for removal of a guardian of a minor and for an enquiry into the accounts submitted by him stated that a certain amount was due from the guardian, and the Court found that the exact amount due was something different, held, that the Court had jurisdiction to make an enquiry and to come to a definite finding as to the exact amount due from the guardian. 38 C. W. N. 438 & 46. All 448 followed. (*Rowland J.*)

JAGANATH LAL vs. LAL BABU.

164 I.C. 282=17 Pat L.T. 756=A.I.R.
1936 Pat. 447.

Sec. 39—Application to remove guardian, if can be made by any person interested.

An application by the maternal uncle of a minor for the removal of the guardian of minor and for an enquiry into the accounts cause submitted by such guardian is not incompetent, be Sec. 39, Guardian and Wards Acts permits the Court to act in the matter of removal of a guardian on the application of any person interested. (*Rowland J.*)

JAGANATH LAL vs. LAL BABU.

17 Pat. L.T. 756=A.I.R. 1936 Pat.
447=164 I.C. 282.

Guardian and Wards Act—(Contd.)

Secs. 41 & 43—Guardian asked to make periodical payments in Court, unwilling to do so and refusing to act as guardian—requisition, if an order under Sec. 41 and if appealable.

Where a guardian being unwilling to continue the fixed periodical payments which the Court required him to make as a condition of his being appointed as guardian refused to act as guardian, it cannot be said that the requisition is an order under Sec. 41. It is to be deemed an order under Sec. 43, Guardian & Wards Act, and as such is appealable. (*Becket J.*)

SURAIN SINGH vs. BALWANT KAUR,

160 I.C. 564.

Sec. 42—New guardian if should be appointed on the resignation of the former guardian when ward is still below 21.

When a person who has been appointed as the guardian of a minor resigns before the minor has attained the age of 21, a new guardian should be appointed to take charge of the person and property of the minor even though the minor has exceeded the age of 18, because the minor, should be treated as an infant unable to enter into a contract or to transact any kind of business himself until he reaches the age of 21. (*Agha Haidar J.*)

DALIP SINGH vs. GIAN SINGH.

162, I.C. 716=A.I.R. 1936 Lah. 142.

Sec. 43—Testamentary guardianship not willing to act as guardian, if can be compelled to do so—Court, if can regulate his duties.

Sec. 17 (5), Guardian and Wards Act provides very clearly that the Court shall not declare any person to be a guardian against his will. Therefore a person who has been appointed testamentary guardian of a minor, but is unwilling to act as such, cannot be compelled to do so by the Court, and it is not open to it under such circumstances to proceed under Sec. 43 and impose conditions on the guardian in

Guardian and Wards Act—(Contd.)

regard to the discharge of his duties. (*Venkata Subba Row & Cornish JJ.*)

KRISHNAEWAMI GOUNDAN vs. PALANI AMMAL.

71 M.L.J. 417 = 44 M.L.W. 513 = 1936 M.W.N. 1042 = A.I.R. 1936 mad. 843.

HINDU LAW.

Adoption—Adoption with consent of distant reversioner, if valid, when nearest reversioner evades consent—widow's motive for adoption, if material.

Where a widow seeks the consent of the nearest reversioner, to an adoption contemplated by her, but the latter evades giving an answer, or his answer is such as to lead her to believe that he has no objection, and the widow thereupon adopts with the consent of other more distant reversioners, the adoption must be deemed to be perfectly valid, and cannot be questioned on the ground of absence of consent of the nearest Sapinda. The motive of the widow in making the adoption is quite immaterial, the only person whose motive requires to be canvassed in such cases being the Sapinda who either gives or withholds his consent. (*Cornish & Varadachariar J.*)

HARI RAMAYYA vs. BHAGAVATLU VENKATACHELAPATI.

70 M.L.J. 619 1936 M.W.N. 261 = A.I.R. 1936 mad. 480 = 163 I.C. 90.

Adoption—Adoption by widow—inquiry into her motives, if relevant.

Whenever a widow has in herself full and free power to adopt without any person's permission, any inquiry into her motives is irrelevant for her action is that of a person who does what she has a right to do. The mere fact that the adoption puts an end to the expectations of the persons who would have succeeded to the property if no adoption had been made is not sufficient to constitute a corrupt or capricious motive as this result is bound to arise in each case of an adoption. (*Harries & Ganganath JJ.*)

BANARSI DAS vs. SUMAT PROSAD.

1936 A.W.R. 857 = 1936 A.L.J. 1237 = A.I.R. 1936 All. 641 164 I.C. 1047.

Hindu Law—(Contd.)

Adoption—Adoption by widow—agreement with natural guardian of adopted son that widow to remain in possession of property during her lifetime, if valid.

The natural guardian of the adopted son can enter into an agreement with the adopting widow by which the widow is to remain in possession of the property during her lifetime. The agreement is valid and does not affect the validity of the adoption. 54 I. A 248 relied on. (*Harries & Ganganath JJ.*)

BANARSI DAS vs. SUMAT PROSAD.

1936 A.W.R. 857 = 1936 A.L.J. 1237 = A.I.R. 1936 All. 641. 164I. C. 1047.

Adoption—Jain widow's power to adopt—limitations.

A Jain widow can adopt a son to her husband without her husband's authority or permission of his kinsmen, and this right exists quite independently of the nature and extent of the widow's rights acquired by her in the estate of her deceased husband. The nature of the property, i. e. whether it is self acquired or ancestral, would affect the rights which the widow would acquire in it, but not the widow's right of adoption. (*Harries & Ganganath JJ.*)

BANARSI DAS & ANR. vs. SUMAT PROSAD & ORS.

1936 A.W.R. 857 = 1936 A.L.J. 1237 = A.I.R. 1936 All. 641. 164 I.C. 1047

Adoption—Adoption by dancing woman, if valid.

The adoption of a daughter by a dancing woman of the prostitute class is valid where the object of the adoption is not to bring her up to lead the life of a prostitute but to get her married and to make her lead a respectable life. If a girl who is adopted by a dancing woman subsequently says that she will not lead the life of a prostitute but would be married if possible, she would not lose her right as an adopted daughter. The adoption of a daughter by a dancing woman cannot therefore by itself without anything

Hind Law—(Contd.)

further being proved offend public policy and the adoption would confer on the adoptee the status of an adopted daughter with all the civil rights flowing therefrom like inheriting to the adoptive mother's properties. 11 Mad. 393 relied on; 4 Bom. 545 dissented from and 21 Cal. 149 explained. (*King & Menon, JJ.*)

VEERANNA vs. SARASIURATNAM.

71 M.L.J. 53=1936 M.W.N. 555.
A-I.R. 1936 Mad- 639 163 I.C. 149.

Adoption—Brother's daughter's son, if can be adopted.

In Bengal the Niyoga rule is part of the law of the land and the adoption is notionally limited to boys engendered under 'Niyoga' by the adoptive father. Therefore the adoption of a son of brother's daughter is prohibited. (*Amir Ali J.*)

HARIDAS CHATTERJEE vs. MANMATHA NATH MALLICK.

A I.R. 1936 Cal. 1=160 I.C. 332.

Adoption—Hindu owner dying leaving widow, nephew and niece—widow adopting son on death of the nephew rights of the adopted son.

A Hindu died leaving behind him his widow, and a nephew and niece, children of his brother. Certain alienations made by the widow were challenged by an adopted of the widow adopted after the death of the nephew. In a suit by the adopted son questioning the alienation and claiming the properties for himself held, that on the death of the propositus, the estate passed by survivorship to the nephew as the sole surviving coparcener and after the death of the nephew, the estate passed by succession to his sister. The estate could not vest in the adopted son, till after the death of the niece, and the former could not on the basis of his rights as the adopted son, challenge the alienation. (*Barlee & Sen JJ.*)

DHONDI DAYANOO SINDE vs. RAMA BALA SINDE.

60 Bom. 83=160 I.C. 549=A.I.R. 1936 Bom. 132=38 Bom. L.R. 94.

Hindu Law—(Contd.)

Adoption—Will by adoptive father declaring adopted son struck off from heirship of his natural family—form of the adoption.

Where in his Will, the adoptive father expressly stated that the adopted son had been struck off from heirship of his natural father and had become without concern with his own brother and had come into the sonship of the testator, held, that the statement in the Will amounted to an express declaration that the adoption was in the Dattaka form and not in the Kritrima form. (*Sir George Rankin.*)

MST. BINDA KUER vs. LALITA PRASAD CHOWDHURY.

41 C.W.N. 161=38 Bom. L.R. 1256
17 P.L.T. 636=1936 O.W.N. 81=44
M.L.W. 546=A.I.R. 1936 P.C. 304=
164 I.C. 340.

Adoption—Giving and taking if necessary.

Although as a general proposition under Daybhaga Law acceptance is not necessary to constitute a valid gift, adoption is a very special form of gift and there cannot be any adoption without giving and taking. (*Amir Ali J.*)

HARIDAS CHATTERJEE vs. MANMATHA NATH MALLICK.

A. R. 1936 Cal. 1=160 I.C. 332.

Adoption—Adoption, if may be cancelled.

An adoption once made, cannot be cancelled by a subsequent deed and the status of the adopted son as such, cannot be altered. (*D. N. Mitter & Patterson JJ.*)

BHUPATI NATH CHAKRAVARTI vs. BASANTA KUMARI DEBI & ORS.

63 Cal. 1098=40 C.W.N. 1320 A.I.R. 1936 Cal. 556.

Adoption—Failure of adoption—effect of.

When an adoption is admitted and fails, there is no extraction of the child from the original family and it is not right to consider sonship annulled because the father might

Hindu Law—(Contd.)

have exercised his patria potestas to destroy the child or resorted to other methods of annulling sonship. (*Amir Ali J.*)

HARIDAS CHATTERJEE vs. MANMATHA NATH MALLICK.

A.I.R. 1936 Cal. 1=160 I.C. 332.

Adoption—Bombay School—Power of widow to adopt—Restrictions on such power by husband when may operate as prohibition.

Under the Bombay School of Hindu law a widow has in herself power to adopt such only of such restriction, if any as may have been imposed on her by her husband but the restriction to operate as a prohibition, must be explicitly made and clearly intended to limit the discretion of the widow for all time. Where the adoption of the boy named by the husband is impossible by reason of the mother of the boy declining to give in adoption the widow can adopt another boy in the absence of any explicit direction by the husband limiting the discretion of the widow in case the adoption of the boy named by him is impossible, (*Lord Roche*.)

JAGANNATH RAO vs. RAM BHARASA.

40 C.W.N. 1125=1936 A.W.R. 746.
=A.I.R. 1936 P.C. 201=70 M.L.J.
309 (P.C.)=38 Bom L.R. 776=1936
A.L.J. 874=64 C.L.J. 13=1936 M.W.N.
942=163 I.C. 1.

Adoption—Bombay School—Properties vesting in mother on successive death of two sons—On death of mother property devolving on wife of eldest son—Adoption by the wife, if valid.

When a widow adopts a son of her husband (who predeceased his undivided brother) after the inheritance devolved on her from her mother-in-law, who had succeeded as mother to the adopting widow's husband's surviving brother, the adoption is valid so as to vest the property in the adopted son. (*Neogi, Subhadar & Pollock, A. J. Cs.*)

RAMCHANDRA vs. MRS. YAMUNI BAI.

31 N.L.R. (Suppl.) 180 182 I.C. 571=
A.I.R. 1936 Nag. 65.

Hindu Law—(Contd.)

Adoption—Adoption of married man from family resident in Madras Presidency into family in Kanara transferred to Bombay, if valid

The mere transfer of a district from one Presidency to another for administration purposes cannot affect the personal law of a resident therein in the absence of proof that he intended to change and had in fact changed his personal law. Therefore, the adoption of a married man being invalid in the Madras Presidency, such an adoption of a member of family resident in Madras into a family resident in North Kanara which had been transferred from the Madras Presidency to the Bombay Presidency for administration purposes was governed by the Madras Law and, therefore, invalid in the absence of evidence of actual change by the adopted son of his personal law. (*Lord Thankerton*.)

SOMASEKHAR ROYAL vs. SUGTOR MAHADEVA ROYAL & ORS.

40 C.W.N. 243=62 C.L.J. 528=38
Bom L.R. 317=70 M.L.J. 159=43
M.L.W. 105=1936 M.W.N. 21=
1936 A.L.J. 95=1936 A.W.R. 70=
159 I.C. 1079=A.I.R. 1936 P.C. 18

Adoption—Adoption in Mithila country—family of the parties originating in the west—form of adoption.

Although in the Mithila country, the Kritrima form of adoption is now overwhelmingly the usual form of adoption, and the expression *Kartaputra* usually refers to a Kritrima adoption, it cannot be doubted that the expression does at times refer to any form of adoption. The fact that the family of the parties originated in the west does not necessarily denote that the adoption is in the Kritrima form. (*Sir George Rankin*.)

MRS. BINDA KUER vs. LALITA PROSAD CHOUDHURY.

41 C.W.N. 161=38 Bom. L.R. 1256=
17 P.L.T. 636=1936 O.W.N. 813=44
M.L.W. 546=A.I.R. 1935 P.C. 304=
164 I.C. 340.

Alienation—Alienation of minor's property by de facto guardian, validity of.

Hindu Law—(Contd.)

An alienation of the share of a minor in a Hindu Joint Family by his *de facto* guardian cannot be treated as void *per se*. The *de facto* guardian can validly alienate the property of the minors for legal necessity or for the family; and the right of a *bona fide* encumbrancee cannot be affected by the want of union of the *de facto* with the *de jure* title. (*Courtney Terrell C. J. & Dhavle J.*)

NOKHE LAL JHA vs. RAJESWARI.

17 P.L.T. 677 = 165 I.C. 213.

Alienation—Power of manager in a Dayabhaga family to deal with minor's property, if similar to that of the manager of a Mitakshara family.

Although it is true that a member of a joint Dayabhaga family has a defined share in the property jointly possessed by the family while the Mitakshara coparcener has only an undivided interest in the property which is jointly owned, yet it is equally true that Dayabhaga families require managers no less than Mitakshara families. The power of the manager in a Dayabhaga family to deal with the shares of minors in proper cases does not differ from that of the manager of a Mitakshara family. (*Courtney Terrell & Dhavle JJ.*)

NOKHE LAL JHA vs. RAJESWARI.

17 P.L.T. 677 = 165 I.C. 213.

Alienation—Joint Dayabhaga family—sale by *de facto* guardian of minors of their shares in property also—bulk of consideration for need of joint family—validity of the sale.

Where the *de facto* guardian of Hindu minors in a joint Dayabhaga family alienated his own share in the estate as well as the shares of the minors, and it appeared that the bulk of the consideration was for the needs of the whole family, held, that the sale could not be set aside in part, but had to be treated as a whole. (*Courtney Terrell C. J. & Dhavle J.*)

NOKHE LAL JHA vs. RAJESWARI.

17 P.L.T. 677 = 165 I.C. 213.

Hindu Law—(Contd.)

Applicability—District transferred from one Presidency to another—Personal law of resident, if affected.

The mere transfer of a district to another Presidency for administrative purposes is not sufficient to affect the personal law of the residents in that district unless and until it is shown that in the case of any resident there that he had intended to change and has in fact changed his personal law. (*Lord Thankerton.*)

SOMASEKHARA ROYAL vs. SUGUTUR MAHADEVA ROYAL.

40 C.W.N. 243 = 70 M.L.J. 159 = 43 M.L.W. 105 = 1936 M.W.N. 21 = 1936 A.L.J. 96 = 1936 A.W.R. 70 = A.I.R. 1936 P.C. 18 = 159 I.C. 1079 = 38 Bom. L.R. 317 = 62 C.L.J. 528.

Debt—Contract entered into by manager—Other coparceners, when liable.

Where a debt has been incurred on a contract entered into by the managing member alone of a Hindu Joint family but the other coparceners are in reality parties to it or for subsequently ratified contract, they will be personally liable. They will also be equally liable if there has been an acquiescence on their part in course of the business in which the particular contract was entered into so as to warrant their being treated as parties to the contract. (*Cornish J.*)

KRISHNA AYYAR vs. PIERCE, LESIE.

A.I.R. 1936 Mad. 64.

Debts—Debts of a joint family—debts how to be discharged on partition.

The antecedent debts of a father of a joint family, unless they are immoral or illegal, form a liability of the joint estate, so that in case of partition of the joint family, provision should first be made for the discharge of this liability. (*Lord Thankerton.*)

SAT NARAIN vs. SRI KRISHNA DAS.

17 Lab. 644 = 40 C.W.N. 1382 = 1936 O.W.N. 681 = 17 Pat. L.T. 717 = 64 C.L.J. 80 = 33 P.L.R. 976 = 38 Bom. L.R. 1129 = 71 M.L.J. 812 = 164 I.C. 6 = A.I.R. 1936 P.C. 277.

Hindu Law—(Contd.)

Debt—Right of creditor to proceed against joint family property in execution of decree against father—Right, if lost by subsequent partition.

A creditor has right to proceed against a joint family property in execution of a decree against the father before partition takes place, and this right is not lost when a portion of the joint family property passes into the occupation of one member of the family under a partition. 51 All. 982 & 58 All. 868 followed. 51 Mad. 361 not followed. (*Becket J.*)

NANDKISHORE vs. MADAN LAL.

A.I.R. 1936 Lah. 64.

Debts—Decree-holder, if can proceed against son's share in execution of a decree against the father for pre-partition debts.

Where after a decree has been passed against the father in a joint family, a partition takes place, the decree-holder can in execution of his decree proceed against the shares allotted to the sons, and is not bound to bring a regular suit to enforce his rights against the sons. 51 Mad. 361, 19 Cal. 693 and 14 Lah. 399 relied on. (*Agha Haider J.*)

PANNALAL vs. RAMANAND.

38 P.L.R. 712 = A.I.R. 1936 Lah. 193 = 163 I.C. 95.

Debts—Property in hands of widow of a predeceased son is liable for the debts of her father-in-law.

Where a Hindu governed by the Mitakshara School dies leaving certain properties and also debts and his son who comes into possession of the properties also subsequently dies leaving a widow, the property left by the son in the hands of the widow is liable to satisfy the debt incurred by the original owner of the property. Even the widow's rights of maintenance from the property are subject to the obligation to pay the debt. 43 All. 604 disented from, 2 Bom. 67 relied on. (*Tek Chand & Dalip Singh JJ.*)

MST. MALLAN vs. PARMATMA DAS.

17th Lah. 568 = 38 P.L.R. 1029 = A.I.R. 1936 Lah. 568.

Hindu Law—(Contd.)

Debt—Debt of grand-father—creditors, if must proceed against all his descendants.

When a debt is incurred by the grand-father which is not tainted with immorality the creditor may elect to proceed against any descendant of the debtor. He is not bound to join all the descendants down to the third generation. 31 C. W. N. 293 relied on. (*Panckridge J.*)

BRIJMOHAN vs. MAHABIR PRASAD.

63 Cal. 194 = 40 C.W.N. 808.

Debt—Debts of grand-father—burden of proving debts incurred immorally, on whom lies—connection between debts and immorality, if essential to defeat claim on the debts.

The burden of proving that the debt incurred by an ancestor is tainted with immorality is on the person who seeks to avoid the debt. Such person must be able to trace a distinct connection between the debt and the immorality. 15 Cal. 717 & 37 C. W. N. 293 relied on. (*Panckridge J.*)

BRIJMOHAN vs. MAHABIR.

63 Cal. 194 = 40 C.W.N. 808.

Debt—Allegation that debt tainted with illegality or immorality—Proof of.

Where a debt is alleged to have been tainted with illegality or immorality, evidence of a general character without in any way connecting the particular debt with any other illegality or immorality given by persons who are not relations and produced after lapse of 40 years is insufficient to prove the allegation. (*Sulaiman C. J. & Bennet J.*)

GANESHI LAL vs. BHAGWAN SINGH.

1936 A.W.R. 547.

Gift—Delivery of possession, if essential.

Delivery of possession is not always necessary to validate a gift under the Hindu Law. But if the property which is the subject matter of the gift is capable of being given possession of to the donee and the donee is capable of taking possession, delivery of possession becomes an essential

Hindu Law—(Contd.)

condition in order to make the gift valid. (Jaislal J.)

BHAGWAN DAS vs. GYAN CHAND.

38 P.L.R. 376—A.I.R. 1936 Lah. 94=
161 I.C. 592.

Gift—*Deed of gift by widow of entire estate in favour of minor daughter and her husband—H band acting as guardian of his minor wife—reversioner, if can question validity of the alienation.*

A Hindu died leaving him surviving his widow M and a minor daughter G, who had been married to one D. M, who came into possession of the property as a Hindu widow made a gift of the entire estate of her late husband, in favour of her daughter G and her husband D. Subsequently on the death of M, G. & D, the plaintiff as the reversionary heir of the original holder of the property sued G's daughter for recovery of possession of the property. *Held*, that the plaintiff was entitled to succeed, because the deed of gift by M in favour of D was not valid because, firstly, the gift was made not to G alone but also in favour of her husband D, and secondly, because G, being a minor, she was not competent to consent to the gift in favour of her husband D. 58 Bom. 528 distinguished. (Diva-ta J.)

BALA DHONDI SATWADE vs. BAYA.

60 Bom. 211=38 Bom. L.R. 1087.

Gift—*Brother, if may contest gift to sister's son, by another brother.*

Under the Hindu Law there is no rule by which a brother may contest the gift of a separated brother in favour of his sister's son. (Tek Chand & Skemp JJ.)

ISHAR DAS vs. BHAGWAN DAS.

38 P.L.R. 1046.

Guardianship—*Guardian, if can be appointed of the separate property of a minor in a joint Hindu family.*

It is an error to suppose that there can be no guardian of the separate property of a minor in a joint Hindu family. After the

Hindu Law—(Contd.)

death of the father, the mother is the natural guardian of the separate property of her minor children; and it is only the minor's share in the coparcenary property which cannot be brought under guardianship so long as there is an adult member of the coparcenary alive. If there is no adult member of the coparcenary alive, even the joint family pr party can be brought under guardianship. (Becket. J.)

SADHURAM vs. PRITHI SINGH.

38 P.L.R. 201—A.I.R. 1936 Lah. 220=
161 I.C. 861.

Guardianship—*Guardian, if can be appointed for the separate property of a minor—Minor's interest in joint family property, if can be brought under guardianship.*

It is wrong to suppose that there can be no guardian of the separate property of a minor in a joint Hindu family. After the death of the father, the mother is the natural guardian of the separate property of the minor children; and it is only the minor's share in the coparcenary property which cannot be brought under guardianship so long as there is an adult member of the coparcenary alive. If there is no adult member of the coparcenary alive, even the joint family property can be brought under guardianship. (Beckett J.)

SADHURAM vs. PRITHI SINGH.

38 P.L.R. 201—A.I.R. 1936 Lah. 220=
161 I.C. 861.

Guardianship—*Contract by father on behalf of minor son, if valid.*

A contract entered into by a Hindu father on behalf of his minor son, is void, unless it is shown that the contract was for the benefit of the minor. (Bhide J.)

NARINJAN SINGH vs. DAMODAR SINGH.

A.I.R. 1936 Lah. 831.

Impartible estate—*Disruption of family—Right of survivorship, if can be claimed.*

In the case of an impartible estate the right of survivorship cannot be claimed

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where the family has disrupted and the junior members of the family have expressly renounced their right of succession to the estate. (*Addision A. C. J., & Din Mohammed J.*)

CHUNI LAL, OFFICIAL RECEIVER vs. JOYGOPAL.

17 Lah. 378=38 P.L.R. 707=A.I.R. 1936 Lah. 55=163 I.C. 103.

Joint family—Separation of one member from joint family—effect.

The separation of one member of a joint family does not automatically involve the separation of the other members of the family, which has to be decided from the conduct of the other members subsequently. When a member brings a suit for partition, he intimates to his co-sharers his clear and unequivocal intention to sever himself from the joint family. That severance takes effect from the date he files the suit. (*Mo Nair J.*)

KANHADEAL BHARGAVA & ORS. vs. BANWARI LALL & ORS.

A.I.R. 1936 Cal. 269.

Joint family—Right of a coparcener to relinquish his rights in joint family property.

A coparcener in a joint family may relinquish his rights in the joint family property on the ground of his apprehension of conflicting debts and wasting the properties. (*Varadachariar J.*)

VENKATA SUBBA REDDI vs. CHINA RAMI REDDI.

A.I.R. 1936 Mad. 292=163 I.C. 863.

Joint family—Co-parcenary property situated in village—right of co parcnener to retain possession of village common land until partition.

A member of a joint Hindu family being a co-parcener, in the co-parcenary property situated in a village is by virtue of that fact a co sharer in the village and therefore will be one of the village proprietor who can retain possession of the village common land till partition. (*Jai Lal J.*)

SHIV LAL vs. SRI KISHEN DAS.

A.I.R. 1936 Lah. 404=163 I.C. 701

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Joint family—Deed of relinquishment by member of a joint Hindu family in respect of certain specified joint family property—executant continuing joint with other members—deed, if extinguishes his interest in the property covered by the deed.

Where under a deed of relinquishment a member of a Hindu joint family purports to relinquish all his interest for certain specified joint family properties but he still continues to be joint with other members, the relinquishment does not extinguish his proprietary interest in the properties covered by the deed. (*Sulaiman C. J. & Bennet J.*)

SHOK HARAN PROSAD SINGH vs. FAKIR CHAND SARJU PROSAD.

1936 A.W.R. 502=1936 A.L.J. 880=A.I.R. 1936 All. 452=163 I.C. 972

Joint family—Mortgage deed of family property by elder member—Family not joint but separate—Admission of execution by elder member, if binds minor members.

An elder member of a Hindu family executed a deed of mortgage in respect of family property on behalf of himself and as guardian of certain minor members. It was found that at the time of the deed, the family was not joint but had separated. Held, that the elder member could not be regarded as manager of the family, and therefore he was not competent to alienate the shares of the minors as their guardian. Nor could admission made by him as to the execution of the mortgage deed bind the latter. (*Srivastava and Nanavutty JJ.*)

RAJARAM vs. RAMESWAR BAKSH SINGH.

1936 O.W.N. 354=161 I.C. 805=A.I.R. 1936 Cal. 270.

Joint family—Lease executed by father not for benefit of family—Security bond for payment of rent—Joint family property if bound.

The father of a joint Hindu family cannot lay a valid charge upon the ancestral property as security for the payment of the rent which would fall due under a deed of lease which had been executed by himself and which had been found to have been

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executed otherwise than for the benefit of the family or for the family necessity. (*Sulaiman C. J. & Bennet & Bajpai JJ.*)

BHARATPUR STATE vs. SRIKRISHNA DAS.

1936 A.W.R. 329=1936 A.L.J. 236=
192 I.C. 612=A.I.R. 1936 All. 327
(F.B.)

Joint family—Mortgage decree against father—Suit by son that certain property not liable to be sold—Onus of proving that such property is ancestral.

There is no presumption that joint property owned by a joint Hindu family is ancestral. In a suit by the son for a declaration that certain property is not liable to be sold in execution of a mortgage decree against his father, the onus of establishing that the property or any part of it is ancestral, lies on the son. (*Harris & Baj-*
II)

DHARA SINGH vs. BHARAT SINGH.

1936 A.W.R. 377=1936 A.L.J. 323=
A.I.R. 1936 All. 613=161 I.C. 62.

Joint family—Mortgage by father to pay pre-emption decree, if binding on other members.

In certain circumstances, a mortgage of ancestral property executed in order to raise money to pay off a pre-emption decree may be a mortgage executed for the benefit of the family and for the benefit of the property and consequently it is binding upon the property and the family. (*Harris & Bajpai JJ.*)

DHARA SINGH vs. BHARAT SINGH.

1936 A.W.R. 377=161 I.C. 62=1936
A.L.J. 323=A.I.R. 1936 All. 613.

Joint family—Question whether a family is joint or separate, how to be determined.

The question whether the members of a Hindu family are joint in estate or not is to be determined with reference to the nature of the interest which the members of the family have in the estate. If there has been a division of their right to, or severance of their interest in, the estate, they

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must be held to be separate in status, though there has been no physical division of the property, and though there may be no separation in food and dwelling. If, on the other hand, there has been no such division of right or severance of interest, they continue to be joint in estate, and mere cesser of commensality would not make them separate in estate, as a member may become separate in food or residence for his convenience. A division of right or a severance of the joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate. (*Sir Shadi Lal J.*)

VENKATAPATHI RAJU vs. DANTULURI VENKATANARASINHA RAJU.

63 I.A. 397=41 C.W.N. 7=64 C.L.J.
131=38 Bom. L.R. 1238=17 P.L.T.
881=1936 A.L.J. 1039=1936 A.W.R.
955=71 M.L.J. 588=44 M.L.W. 408
=1936 O.W.N. 673=164 I.C. 1=A.I.
R. 1936 P.C. 264

Joint family—Power of the father in a joint family to effect a separation.

The father of a joint family has the power to divide the family at any time during his life without the consent of his sons, and if he makes a division, it has the effect of separating, not only the father from the sons, but also the sons *inter se*. (*Sir Shadi Lal J.*)

ALLURI VENKATAPATHI RAJU vs. DANTULURI VENKATANARASINHA RAJU.

63 I.A. 397=41 C.W.N. 7=64 C.L.J.
131=38 Bom. L.R. 1238=17 P.L.T.
881=1936 A.L.J. 1039=1936 A.W.R.
955=71 M.L.J. 588=44 M.L.W. 408
=1936 O.W.N. 673=164 I.C. 1=A.I.
R. 1936 P.C. 264.

Joint family—One son severing his connection with the family and renouncing his interest in joint estate—effect.

Where a member of a joint Hindu family severs his connection with the joint family, and does not receive any share in the joint estate, but simply renounces his

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interest therein, no definement of shares need take place, and his renunciation does not effect a change in the status of the remaining members *quoad* the family property, and they continue to be co-parceners as before, the only effect of renunciation being to reduce the number of the persons to whom shares would be allotted, if and when, a division of the estate takes place. (*Sir Shadi Lal, J.*)

VENKATAPATHI RAJU vs. VENKATA-NARASINHA RAJU.

63 I.A. 397=41 C.W.N. 7=64 C.L.J. 131=38 Bom. L.R. 1238=17 P.L.T. 551=1936 A.L.J. 1039=1936 A.W.R. 255=71 M.L.J. 553=44 M.L.W. 408=1936 O.W.N. 673=164 I.C. 1=A.I.R. 1936 P.C. 264.

Joint family—Enfranchised Karnam service—Inam lands if constitute separate property.

When Karnam service Inam lands have been enfranchised in favour of a person, the lands form the separate property of the person in whose name they have been enfranchised, and are not subject to any claim to partition by other members of the family. 8 Mad. 249 (2) & 44 Mad. 643 relied on. (*Madhavan Nair & Stone JJ.*)

NAINA PILLAI vs. DAIVANAI AMMAL.

1936 M.W.N. 256=A.I.R. 1936 Mad. 177=162 I.C. 23.

Joint family—Mitakshara—Acquisition by some members by joint labours without aid of joint family property—Separation of family—Some of such joint acquirers continuing to live together, if may form joint family in full sense so as to make their property subject to devolution by survivorship.

Even when some only of the members of joint family acquire property by their joint labours without the aid of joint family property—there being none—a number of them, on separating from the rest of the family and continuing to live together, may be joint in the full sense as members of an undivided family and when such is the case, on the death of one of them while remain-

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ing joint with the others, his property will pass by survivorship. (*Sir George Rankin, J.*)

NATHULAL vs. BABURAM.

40 C.W.N. 481=1936 A.L.J. 686=1936 M.W.N. 499=19 N.L.J. 62=1936 O.W.N. 204=1936 A.W.R. 153=38 Bom. L.R. 462=17 Pat. L.T. 321=A.I.R. 1936 P.C. 103=161 I.C. 33

Joint family—Self acquired property treated as joint, if loses its separate nature.

By merely being dealt with as joint family property, the self-acquired property of the person who deals with it as such, does not necessarily lose its character of separate property. It must be shown by the person who alleges that the property is joint family property, that the owner has voluntarily thrown the property into the joint stock with the intention of abandoning all separate claims on it. (*Madhavan Nair & Stone, JJ.*)

NAINI PILLAI vs. DAIVANAI AMMAL.

1936 M.W.N. 256=A.I.R. 1936 Mad. 177=162 I.C. 23

Joint family—Suit to recover debt due to joint family business—retiring coparcener if must assign actionable claim.

When a member of a joint Mitakshara family business retires from the business and renounces his share therein, it is not necessary for him to assign his interest in actionable claims of the family business, nor is it necessary in a suit based on such actionable claim to make the legal representative of such retiring member a party. 49 Mad. 254 relied on. (*Panckridge J.*)

BRIJMOHON vs. MAHABIR.

63 Cal. 194=40 C.W.N. 808.

Joint family—Liability of members for debts incurred by manager for joint family business after partition.

The joint family business is an asset of the joint family and when there is a division in status, no matter how brought about, there is no obligation on any member to

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publish a notice of such division. A creditor dealing with the manager of a joint family does so with knowledge of the limitations on his powers whether the dealings relate to business or any other asset of the family. The members of a joint family as such are not partners of a joint family business carried on by a manager. It is not therefore desirable to apply all the principles of partnership law to a joint family business as such. But of course, if a member of a family takes an active part in the business and by his conduct induces the belief that he is a partner, the principles of partnership law may be applied to him so far as is necessary to do justice. (*Venkata Subba Rao, A. C. J. & Venkataramana Rao J.*)

RAMASWAMI CHETTIAR vs. SRINIVASA IYER.

70 M.L.J. 214=43 M.L.W. 437=1936 M.W.N. 134=162 I.C. 371=A.I.R. 1936 Mad. 94.

Joint family—Individual coparcener, if can transfer his share.

Under the Mitakshara School of Hindu Law the coparcenary property belongs to the whole coparcenary family as a unit and not to any individual coparcener, and such a coparcener therefore cannot transfer any part of such property. (*Ganganath, J.*)

KUNWAR LALAJI vs. RAMDOVAL.

A.I.R. 1936 All. 77

Joint family—Death of one of two brothers constituting a joint family—Part of property allotted to a deceased widow in arbitration proceedings—Widow, if acquires absolute estate.

Where on the death of one brother in a Joint Hindu Family consisting of two brothers, the property of the deceased passes by survivorship and not by inheritance, but the widow of the deceased claims to be heir of her husband and on the dispute being referred to arbitrators she is awarded a part of the husband's property, and the language in which the operative clauses of the award are couched is the same as regards the property given to the

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deceased's brother and the property given to the widow, no words being used to narrow her interest, she acquires an absolute interest in the property allotted to her. (*Sir George Rankin J.*)

NATHU LALL vs. BABU RAM.

1936 A.W.R. 153=196 O.W.N. 204=1936 A.L.J. 686=1936 M.W.N. 499=40 C.W.N. 481=19 N.L.J. 62=161 I.C. 33=38 Bom. L.R. 462=17 Pat. L.T. 321=A.I.R. 1936 P.C. 103 (P.C.)

Joint family—Right of male issue to property acquired by the members of the joint family.

When members of a joint family live together and acquire properties together by their joint exertions, in the absence of any indication to the contrary, such property would be joint family property wherein the male issue would acquire a right by birth. (*Venkataramana Rao J.*)

AMIRDHAM vs. VALLIAMMAL.

43 M.L.W. 215=162 I.C. 668=A.I.R. 1936 Mad. 19.

Joint family—Managing member not taking care to preserve property—other members, if entitled, to take steps to preserve it.

If the managing member of a Hindu Joint family is disabled or fails or neglects to take steps to preserve the joint family property which is being lost to the family it is competent to the other members of the family to take necessary steps to do so. (*Venkataramana Rao J.*)

AMIRDHAM vs. VALLIAMMAL.

43 M.L.W. 215=162 I.C. 668=A.I.R. 1936 Mad. 19.

Joint family—Proof of separation—unmistakable intimation of one member to become separate effects separation though there is no division of property.

A member of a joint Hindu family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declaration of a fixed intention to

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become separate, even though he goes on living jointly with the other members of the family, and there is no division of property. (*Sir John Wal, J.*)

RAMSAY PROSAD CHOUDHURY vs. BABUYEE RADHIKA DEBI.

1936 A.W.R. 73=16 P.L.T. 851

Joint family—*Property inherited by two brothers from maternal grandfather, whether becomes joint family property if they blend it with ancestral property.*

It is possible for two brothers, who inherit property from their maternal grandfather, to blend it with the property which they inherit from their own father and from their own paternal grandfather and thus make the property inherited from their maternal grandfather a portion of joint family property, and in that event the sons would have an interest by birth in the property which their father inherited from their maternal grandfather. (*Bajpai J.*)

MST. MAINA vs. BHAGWATI PROSAD.

1936 A.W.R. 691=1936 A.L.J. 1230
=A.I.R. 1936 All. 557=164 I.C. 193,

Joint family—Debts contracted by manager—liability of other members.

The manager of a joint family business, has an implied authority to borrow money, if such borrowing is necessary for a legitimate and proper purpose of the family business. Where such debts have been incurred, the other co-parceners whether they be adults or minors, are liable, but to the extent only of their interest in the joint family property. They are not liable personally unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct or one which they have subsequently ratified. (*Coldstream & Abdul Raschid, JJ.*)

SHIV CHANDRA DAS vs. HARI RAM.

17 Lah. 395=38 P.L.R. 842.

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Joint family—*Burden of proving that property acquired separately has been amalgamated with joint property.*

Where there is a joint family and a number of joint family property, there is always a presumption that property acquired by a member of the family is acquired out of that number and is an accretion to the joint family property. If it is shown that the property was acquired as a separate property by a member of a joint family but he amalgamated it with the joint family property, it is for the person so alleging to show that there was an unequivocal intention on the part of the person who acquired the property to amalgamate it with the joint estate. The question is one which depends upon intention and that intention must be inferred from all the evidence which is adduced. (*King C. J. & Thomas, JJ.*)

JANGU SINGH vs. JOT SINGH.

1936 O.W.N. 582.

Joint family—Decree against co-parcener—decree-holder, in order to attach joint family property, must show that judgment debtor sued as the manager.

When once it is shown that a co-parcener acted as the representative of a joint family when an encumbrance is made, it must be presumed that the plaintiff suing such co-parcener sued him as the representative of the family property as burdened by the decree. The burden of proving that the encumbrance was created by the co-parcener in his capacity as the representative of the joint family lies on the plaintiff, and unless he discharges the burden, he cannot proceed against the family property. (*Worl J.*)

MUTHI PANDA vs. SURAJ K. LAL.

A.I.R. 1936 Pat. 319.

Joint family—Mortgage of joint family property by father—Mortgage if binding on the estate.

Where the father in a Hindu joint family as the managing member of the family executes a mortgage, the estate of

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the sons cannot be bound by the mortgage unless it is shown that the mortgage was executed for the purposes of necessity or for discharge of an antecedent debt. 51 All. 186 followed; 46 All. 95 explained; 47 All. 122 dissented from. (*Pollock J.*)

RAM KISSAN BHOLARAM SHOP, AKOLA vs. SHEORAM KISAN RAO.

A.I.R. 1936 Nag. 93=163 I.C. 99.

Joint Family—Presumption of jointness—extent to which it varies.

The strength of presumption that a Hindu Joint Family continues to be joint necessarily varies in each case. The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family the presumption becomes weaker and weaker. In the case of second and third cousins, the presumption of jointness practically disappears. 53 Bom 213 followed. (*Addison & Abdul Rashid, JJ.*)

KANHYA LALL vs. FIRM DEBI DAYAL BARIJ LAL.

A.I.R 1936 Lah. 514.

Joint Family—Contractual partnership between uncle and nephew if governed by Hindu Law,

Co-parcenary with all its incidents is a creation of Hindu Law, and if a business is not a heritable asset descended from the common ancestor it cannot be regarded as the ancestral property of a Hindu joint family. A contractual partnership may be joint Hindu family property, but such partnership will not be governed by the provisions of Hindu Law relating to co-parcenary property. It is possible for an uncle and a nephew to possess joint family property by throwing all their property into a common fund, but it is not possible for an uncle and nephew to start business jointly and to give to it the character of an ancestral joint Hindu family business by their own act. Such business would merely be a contractual partnership and cannot be governed by the

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provisions of the Contract Act. (*Addison & Abdul Rashid J.*)

KANHAYA LAL vs. DEBI DAYAL BARIJ LAL.

A.I.R. 1936 Lah. 514.

Joint family—Decree against father if can be executed against the son's share after partition.

Under Hindu Law, property which falls to the share of a son on partition is liable for the debt incurred by the share before the partition. Where a decree was obtained against a Hindu father the decree-holder can after partition has been effected between the father and the son proceed against the son's share in execution of the decree against the father obtained before partition. It is not necessary for such a creditor to file a regular suit to enforce his right against the son. (*Agha Haider J.*)

PANNA LAL vs. RAMANAD.

38 P.L.R. 712=A.I.R. 1936 Lah. 942

Joint family—Separate property thrown into common stock—evidence showing that it come from that separate property thrown in common stock, if sufficient to establish a joint family.

Where the only evidence to show that property acquired by the father in a joint Hindu family was thrown into the common stock and treated as joint family property, is that the income from the said property was used by the father to support himself and his son, held, that the evidence is not sufficient to prove that the father intended to waive his separate rights to his self acquired property and the plea that the property became joint must fail. (*Pollock J.*)

GOPAL TRIMBAK BHATE vs. KESHEOSA VISHNOOSH LTD.

165 I.C. 350=A.I.R. 1936 Nag. 185

Joint family—managing member contracting debts for family business—share of minor, if liable.

When a Hindu Joint Family carries on a business of a kind appropriate to the caste of that family, the member who manages

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has an implied authority to contract debts for the purpose of that business and a creditor supplying goods to the business, of the class and character dealt with by the purchaser is not bound to inquire into the necessity of the family, because the purchase of commodity of that kind and in that sort of quantity is necessary for the carrying on of a business of that character, and the share of a minor who is a coparcener in such a joint family is liable for debts contracted by the managing coparcener for the purpose of the joint family business. 34 Bom. 72 & 8 Lah 597 followed (*Courtney Terrell C. J.*)

GHASIRAM BISHESWAR LAL FIRM vs. OTLA GAURAI OTLA BASARAJ FIRM.

164 I.C. 876 = A.I.R. 1936 Pat. 485

Joint family—Debts contracted by Manager of a joint family—Extent to which other members of the joint family liable.

In the case of debts contracted by a Manager of a joint Hindu family firm in pursuance of his implied authority in the ordinary course of the family business there is a difference between the liability of the Manager and the liability of his coparceners. The Manager is liable personally, but as regards the other coparcener, they are liable only to the extent of their interest in the family property, unless they are actual contracting parties or have ratified the contract of the Manager. (*Coldstream and Abdul Raschid JJ.*)

SHIV CHARAN DAS vs. HARI RAM.

17 Lah. 395 = 38 P.L.R. 342.

Joint family—Loan incurred for completing a house, if one for legal necessity.

It is incumbent upon a prudent father or Manager of a joint family to take steps to complete an incomplete house and thus make it into a real asset. To allow a house to remain unfinished and to crumble away would be a most imprudent thing to do, and in the circumstances, borrowing the money to complete the house is a perfectly

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justifiable act on the part of the father. (*Harries & Ganga Nath JJ.*)

RAM PROSAD vs. BISHAMBHAR NATH

1936 A.W.R. 779 = 1936 A.L.J. 1051.
= A.I.R. 1936 All. 607 = 164, I.C. 572

Joint family—mortgage held not binding on joint family—principles governing joint family, if will apply.

When once a mortgage is held not to be binding on the Hindu joint family, the principles governing the joint family would not apply to the mortgage. The validity of the terms of the mortgage will have to be determined under the provisions of the Contract Act and not under the provisions of the Hindu Law relating to joint Hindu family. Accordingly, the rate of interest provided in the mortgage in such a case, cannot be reduced on the ground that the mortgagee have failed to show that there was necessity for the mortgagors to borrow at the contractual rate. (*Harries & Ganga Nath J.*)

BANARSI DASS vs. COLLECTOR OF SAHARANPUR.

1936 A.W.R. 887 = 1933 A.L.J. 1262
= A.I.R. 1936 All. 712 = 165 I.C. 498

Joint family—Power of manager to borrow money for an old family business which is the main stay of the family.

The manager of joint Hindu family is justified in borrowing a reasonable sum for the purpose of a business, which, whether ancestral or not, is an old business and is the mainstay of the family and is the only income producing business or property belonging to them or in order to start a fresh business to replace an older one which he had previously conducted and disposed of at a profit. (*Harries & Ganga Nath JJ.*)

RAM PROSAD vs. BISHAMBHAR NATH & ORS.

1936 A. W. R. 779 = 1936 A. L. J. 1051 = A.I.R. 1936 All. 697 = 164 I.C. 572.

Joint family—separation of one member with property in lieu of his share—deed of

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separation defining the share of other members also but stipulating for continuance of joint status and division according to the defined shares at a future date on the happening of a certain event—such covenant, if separates other members inter se immediately.

When one member separates from the joint family with a property in lieu of his share and the deed of separation defines the respective shares of the other members as well, and adds a condition that division of the other members *inter se* in accordance with the shares as defined is to take place on a future date on the happening of a certain event, such a covenant, besides, being valid, does not effect an immediate severance of status, but postpones it to a future date. (*Sir Shadi Lal*.)

PUERNANTHACHI vs. T. S. GOPALASWAMI ODAYAR & ORS.

41 C.W.N. 14=164 I.C. 26=A.I.R. 1936 P.C. 281=1936 A.L.J. 1094=1936 A.W.R. 1089=38 Bom. L.R. 1247=64. C.L.T. 147=17 Pat L.T. 910=1936 O.W.N. 709=70 M.L.J. 554.

Joint family—father in joint family purchasing property with own money in name of his son—nature of right acquired by the father.

Where the father in a Hindu Joint Family purchases property with his own money, but in the name of his son, the presumption is that he intended to make the purchase for his own benefit and not for the benefit of his son. Therefore, the property so purchased, is to be deemed to be his self acquired separate property. (*Pollock J.*)

GOPAL TRIMBAK BHATE vs. KESHEOSA LTD.

165 I.C. 356=A.I.R. 1936 Nag. 185

Joint family—Position of manager—Certificated guardian, if necessary.

The Manager of a joint Hindu family is regarded as guardian of the interest in the coparcenary property of all the minor members of the family, and therefore a cer-

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tificated guardian can be appointed for such minors. (*Srivastava & Nanavutly JJ.*)

RAJARAM vs. RAMESWAR BAKSH SINGH.

1936 O. W. N. 354=161 I. C. 605=A.I.R. 1936 Cal. 270

Joint family—Joint family business—liability of member taking active part and member not taking active part.

Subject to the provisions of the Partnership Act, "a partner is the agent of the firm for the purpose of the business of the firm". That however is not the normal position of the members of a Hindu joint family who own and carry on a family business. So long as a member of the family which owns the business is a minor or takes no active part in the management or working of it, his liability is limited to the extent of his interest in the family property; but if he takes an active part in carrying on the business after he has attained his majority, he makes himself personally liable for the obligations of the business contracted after he comes of age. (*Page C. J. & Mya Bu J.*)

CHIDAMBAMAM CHETTIAR vs. MUTAYA CHETTIAR.

14 Rang. 122=A.I.R. 1936 Rang. 180=162 I.C. 164

Joint family—Debt—Renewal of older bond by manager—Admissibility against minor members.

In a joint Hindu family, so far as recitals as to the existence of legal necessity contained in a mortgage deed executed by adult members who borrowed the money are concerned the other members should not be held to bound by them when they are contesting the validity of the mortgage deed itself. In such a case, the interest of the mortgagors and the contesting members cannot be regarded as identical. But where a managing member is not himself raising any loan but is renewing an older bond, particularly, if that was executed by an ancestor, his acknowledgment is obviously made on behalf of the entire family as their interest is identical. An acknowledgment

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of such a kind in the form of a renewal of a mortgage deed so as to postpone the institution of a suit is admissible in evidence against minor members of the family, particularly if they are born subsequently. (*Sulaiman C. J. & Bennet, J.*)

GANESHI LAL vs. BHAGWAN SINGH.
1936 A.W.R. 547.

Joint family—Debts incurred by Manager—Liability of adult co-parceners.

Under ordinary circumstances the rule of Hindu Law is that adult co-parceners are liable only to the extent of their interest in the joint family property for the debts incurred by the manager of the joint Hindu family business. But where such adult co-parceners operate upon the account and participate in the business of the firm they make themselves liable as contracting parties. (*Jailal & Sale, J.*)

PUNJAB NATIONAL BANK LTD., vs. JAGADISH SAHAI.
163, I.C. 114=38 P.L.R. 733=A.I.R. 1936 Lah. 390.

Maintenance—Liability of a Hindu to maintain his aged parents—step brother, if entitled to maintenance.

Under Hindu law a person is under a legal obligation to maintain his wife, his, minor sons, his unmarried daughter and his aged parents and this irrespective of whether he possesses any property or not. There is no obligation however to maintain one's minor step-brother. (*Addison & Abdul Rashid, J.J.*)

NARINJAN SINGH vs. GURMUKH SINGH.
38 P.L.R. 764.

Maintenance—Adult son, if entitled to maintenance from father,

Under the Bengal School of Hindu Law and also under other Schools, an adult son is not entitled to maintenance from his father or father's estate. (*D. N. Miller & Patterson J.J.*)

BEUPATI NATH CHAKRAVARTY vs. BASANTA KUMARI DEVI & ORS.
63 Cal. 1098=40 C.W.N. 1320=A.I.R. 1936 Cal. 556.

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Maintenance—Wife when becomes entitled to separate maintenance and residence.

Under the Hindu Law, the right of a wife to maintenance is a matter of personal obligation on the husband and is not dependant on or qualified by a reference to the possession of any property by the husband. The first duty of a Hindu wife however, is to submit to her husband's authority and stay under his roof and not to quit his house without any adequate excuse justifying cause. If however, the husband by reason of his misconduct, or cruelty or by his refusal to maintain her, or for any other justifiable reason, makes it necessary for her to live separately from him, he must be deemed to have deserted her, and she will be entitled to separate maintenance and residence. (*B. J. Wadia, J.*)

BAI APPIBAI vs. KHIMJI COOVERJI.
60. Bom. 455=38 Bom. L.R. 77=
A.I.R. 1936. Bom. 138=162 I.C. 188.

Maintenance—Wife living away for justifiable reasons if entitled to separate maintenance.

Cruelty and abandonment of the wife by the husband are not the only grounds on which separate maintenance can be allowed to a wife. They are no doubt recognised as legitimate grounds but it is also recognised that whenever the wife lives away from the husband for justifiable reasons and she does not do so for any improper purpose, she is entitled to separate maintenance. 55 M. L. J. 242, 34 Mad. 398 & 1 Bom. 164 distinguished. (*Varadachariar & Mookett J.J.*)

VENKATAPATHI NAYANI VARU vs. PUTTAMMA NAGITH.

71 M. L. J. 499=1936 M.W.N. 793=
43 M.L.W. 590=A.I.R. 1936 Mad. 609
=165 I.C. 314

Maintenance—Suit for maintenance—offer by husband to take back, if can defeat suit.

During the pendency of a suit for maintenance by a wife, an offer by the husband to take the wife back cannot defeat the

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suit, and the right to maintenance cannot be negatived merely on that ground. An offer of this kind must be carefully scrutinised with a view to determining whether it is a bona fide one and the determination of this question largely depends on the facts and circumstances of the case. (*Varada-chāriar & Mockett JJ.*)

VENKATAPATHI NAVANI VARU vs. PUTTAMMA NAGITH.

71 M.L.J. 499=1936 M.W.N. 793=
44 M.L.W. 890=165 I.C. 314=A.I.R.
1936 Mad. 609.

Maintenance—Rule for determining amount of maintenance.

No exact rule can be laid down as to the amount claimed for maintenance. Every case has to be judged on its own facts. In determining the amount however, the Court usually takes into consideration the reasonable wants of the woman, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband. She can claim maintenance even when she has property of her own, though that fact is also to be taken into account in determining the quantum. (*B. J. Wadia J.*)

BAI APPIBAI vs. KHMJI COOVERJI.

60 Bom. 455=38 Bom. L.R. 77=A.I.R.
1936 Bom. 138=162 I.C. 188.

Marriage—essential ceremonies—presumption as to due performance and legality.

There are two ceremonies essential to the validity of a Hindu marriage, viz., the invocation before the consecrated fire, and the *saptapadi* or the taking of seven steps by the bridegroom and bride jointly before the consecrated fire. The marriage becomes perfect and irrevocable only when the seventh step is completed for it then creates a religious tie which once tied, cannot be untied. When once celebrated the marriage cannot be dissolved, even if it has been irregularly performed. When it is proved that a marriage was performed in fact, there is a presumption of there being a marriage in law. There is also the presumption

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that if some of the ceremonies usually observed on such occasions have been performed they have been duly performed. (*B. J. Wadia, J.*)

BAI APPIBAI vs. KHMJI COOVERJI.

60 Bom. 455=38 Bom. L.R. 77=A.I.R.
1936 Bom. 138=162 I.C. 188.

Marriage—Benares School—marriage between sub-caste of same varna if invalid—twice born classes if in a different position.—

The Hindu law of the texts does not prohibit marriage between persons belonging to different sub divisions of the same varna, even of a twice born class; and where no definite custom to the contrary is proved, the general practice of Hindus of marrying within the sub-caste and the general disinclination to marry outside cannot itself be relied upon as a custom which has acquired the force of law forbidding such marriages. Accordingly, marriages between a Kasaudhan and an agrahari, both sub-castes of the vaishya caste is lawful in the absence of a custom to the contrary. (*Sir Shadi Lal.*)

GOPI KRISHNA KASAUDHAN vs. MST. JAGGO.

63 I.A. 295=40 C.W.N. 1037=58 All.
397=162 I.C. 993=38 P. L. R. 829=
1936 A.L.J. 819=17 Pat. L.T. 477=38
Bom. L.R. 64=19 N. L. J. 189=1936
M.W.N. 652=1936 A.W.R. 690=A.I.R.
1936 P.C. 198=71 M.L.J. 31.

Marriage—Benares School—Agraharis of U. P.—desertion of wife by husband if entitles former to remarry)

Among the Agraharis of the United Provinces abandonment or desertion of the wife by her husband dissolves the marriage tie and sets her free to contract another marriage. (*Sir Shadi Lal.*)

GOPI KRISHNA KASAUDHAN vs. MST. JAGGO.

63 I.A. 295=40 C.W.N. 1007=58 All.
397=162 I.C. 993=38 P. L. R. 829=
1936 A.L.J. 819=17 Pat. L.T. 477=
=64 C. L. J. 1111=19 N. L. J. 189
=1936 M.W.N. 652=1936 A. W. R.
690=A.I.R. 1936 P.C. 198=71 M.L.J.
31.

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Marriage—Girl on the death of her first husband re-marrying a person belonging to same gotra as her father—second marriage, if valid.

In Hindu Law, the marriage of a girl within her father's "Gotra" is invalid. But upon marriage the wife passes into her husband's "gotra" and there is no definite authority for the proposition that upon the death of her husband, the widow passes again into her father's "gotra". Accordingly, where a girl upon the death of her husband remarries, her second marriage is not invalid simply because her second husband belongs to the same "gotra" as that of her father. (*Thom & Raghpal Singh, JJ.*)

RADHA NATH MUKHERJI vs. SHAKTI-PADO MUKHERJI,

1936 A. W. R. 784=1936 A. L. J. 970
164 I. C. 595=A. J. R. 1936 Al. 624.

Partition—Partition of joint family by agreement—what such agreement must indicate.

There is no doubt that a joint undivided Hindu Family can cease to be such and members of it can become separate merely by an agreement to that effect. But any such agreement must clearly indicate on the face of it an intention to separate and to hold the property upto that time in defined shares as separate owners. If on the face of it, the agreement is clear and unambiguous and it manifests the intention of the parties to separate, then nothing more is necessary to bring about an alteration of the status of the persons who are the parties to that agreement. (*Costello & Panckridge, JJ.*)

SHAMLAL SINGH vs. HIRU SINGH.

A. L. R. 1936 Cal. 472.

Partition—Partition of status in respect of jointness in mess and of property, if possible.

A member of a joint family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declarations, of a fixed intention to become separate even though he goes on living jointly with the other members of the fami-

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ly, and there is no division of property. (*Sir Jonh Wallis.*)

RAMASRAY PROSAD CHOUDHURY vs. BABUYEE RADHIKA DEVI.

40 C. W. N. 385.

Partition—Powers of father and mother to represent sons at partition with his brother,

There can be no doubt that a father is entitled to and competent to represent his sons in a partition with his brothers, and a partition effected by him will be binding on the sons unless it is shown that it was fraudulent or unfair or prejudicial to their interest. The fact that some of the members are minors would not prevent the father in virtue of his position as the head of his branch to represent them. The mother however has no right of representation in respect of the family property. Her position is only that of a natural guardian and her power can only be adjudged in that capacity. As a guardian she has no power to consent on behalf of the minor to any act which would deprive him of any portion of his property. 35 All. 337 and 8 M. L. W. 400 relied on.

SURBA RAO vs. SUBBA RAO.

44 M. L. W. 515=71 M. L. J. 419=1936 M. W. N. 1045=A. J. R. 1936 Mad. 689
=164 I. C. 997

Partition—Father's power to partition joint estate, without consent of sons, if binding on sons.

The father of a joint family has power to divide the family at any time during his life without the consent of his sons, and if he makes a division, it has the effect of separating not only the father from the sons' but also the sons' interest. (*Sir Shadi Lal.*)

VENKATAPATHI RAJU vs. VENKATANARASINHA RAJU.

63 I. A. 397=38 Bom. L. R. 1235=41 C. W. N. 7=64 C. L. J. 131=44 M. L. W. 408=71 M. L. J. 558=A. J. R. 1936 P. C. 264=1936 O. W. N. 673=164 I. C. 18
=1936 A. W. R. 955=1936 A. L. J. 1039

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Partition—*Co-parcener collecting money belonging to joint family, but not investing the same, if can be made liable for interest.*

A member of a joint Hindu Family, cannot, in a suit for partition claim interest on sums collected by any other co-parcener, so long such fund has not been in any way invested by such co-parcener. (*Stone & Varadachariar JJ.*)

YASOBANDRA NAINAR vs. T. S. SAM-ANTHABADRAN & ORS.

59 Mad. 154 = 42 M.L.W. 674.

Partition—*Suit by minor co-parcener for partition--date from which separation takes place.*

The institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family, that is to say, the mere institution of a suit does not effect a separation of the family, but the separation only takes place when the suit is decreed. In such a case the defendant is liable to render accounts to the plaintiff only from the date of the passing of the preliminary decree 42 All, followed, 41 Mad. 442 relied on, (*Addison & Abdul Rashid JJ.*)

HARI SINGH vs. PRITAM SINGH,

A.I.R. 1936 Lah. 504.

Partition—*Allotment of extras here as. Jyestabagam—Allotment bonafide and acted upon—if illegal.*

It is true that the allotment of any property as Jyestabagam has been absolute and the Court would not enforce it. But if the members of joint family agree in effecting a partition to give some extra property to their eldest members, or even to one of them bonafide, such an agreement cannot be considered to be illegal on the ground that a certain property was allotted as for Jyestabagam or was given in excess

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of his legitimate share. (*Venkataramana Rao J.*)

SUBBA RAO vs. SUBBA RAO,

71 M.L.J. 419 = 1936 M.W.N 1048 = A.I.R. 1936 Mad. 689 = 164 I.C. 997.

Partition—*Son's power to enforce partition.*

In the Punjab, a son is not entitled to enforce partition during the life-time of his father, even of joint family property. (*Jailal J.*)

PUNJAB NATIONAL BANK LTD., vs. JAGADISH SAHAI.

38 P.L.R. 733 = A.I.R. 1936 Lah 390 163 I.C. 114

Partition—Dayabhaga School—Brother's partitioning property, if must, be deemed to be separate in respect of properties.

Under the Dayabhaga School of Hindu Law, once there is a partition between brothers, it must be taken that all the parties are separated. The mere fact that the brothers execute certain documents in respect of certain property jointly does not show that they have not separated. (*Mohammad Noor & Varma JJ.*)

NETAI LAL DATTA vs. GOBINDA BHUSAN SEN,

A.I.R. 1936 Pat. 142 = 161 I.C. 695

Partition—Mitakshara—wife or mother or grandmother, if becomes owner of her share until actual division of her property

Although under the Mitakshara Law, division by metes and bounds is not necessary to constitute partition in the sense of division of rights and alteration of the status of the members from joint to divided, a wife or the mother or grandmother does not become and cannot be recognised as the owner of the share to which she would be entitled on partition merely on such division being made, and before the property is actually divided by metes and bounds, 33

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All. 118 & 42 Bom. 335 affirmed. 11 M. I. A. 93 and 30 I. A. 139 distinguished. (*Sir Lancelot Sanderson.*)

PR. TAPMULL AGARWALLA *vs.* DHANPATI BISI

40 C.W.N. 193 = 1935 A.W.R. 1517

Religious Endowment—Properties held by Mohunt, if presumed to be debutter.

There is no presumption in law that if a Mohunt holds any property it is prima facie debutter property. The plaintiff has the burden on him of establishing that the properties in respect of which he is asking for possession are properties to the possession of which he is entitled in the right in which he is sued (*Mukherjee & S. K. Ghosh, JJ.*)

GOVINDA RAMANUJ DAS MOHUNT *vs.* MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326 = 62 C.L.J. 153 = 164 I.C. 33

Religious Endowment—Principal and Subordinate Asthals—superior right of Mohunt of principal Asthal.

The supreme head of a Muth is a single person. There may in some cases be a chief or presiding Mohunt and also other Mohunts of lesser grades. Subordinate Asthals may have and do often have each a Mohunt of its own at their head. An original foundation with a *gaddinashim* Mohunt exercising jurisdiction over a subordinate Asthal or Mutt is not unoften found with relations existing between them in respect of proprietary rights to their respective possessions depending upon their respective constitutions. 10 Mad. 375 & 27495 followed. (*Mukherji & S. K. Ghosh JJ.*)

GOBINDA RAMANUJ DAS MOHUNT *vs.* MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326 = 62 C.L.J. 153 = 164 I.C. 33.

Religious Endowment—Power of Mohunt to divide Asthals as between his successors.

In the case of a Mohunt who has a number of separate asthals which by usage

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have all been held by one man, the Mohunt has ordinarily no power to provide for their division between his successors, or to saddle the property of one or more of the component Asthal with a reservation in favour of the others. The essence of the law governing such Muts lies in the following of custom or usage. Prima facie, such a separation would be improper unless there were special circumstances justifying it. (*Mukherji & S. K. Ghosh JJ.*)

GOBINDA RAMANUJ DAS MOHUNT *vs.* MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326 = 62 C.L.J. 153 = 164 I.C. 33.

Religious Endowment—Power of a mohunt to transfer right of management.

A mohunt of a muth, unless there is a custom to the contrary, cannot ordinarily transfer the right of management vested in him even though such transfer is coupled with an obligation to manage in conformity with the trust annexed thereto. 8 C. L. J. 499 followed. (*Mukherji & S. K. Ghosh, JJ.*)

GOBINDA RAMANUJ DAS MOHUNT *vs.* MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326 = 62 C.L.J. 153 = 164 I.C. 33.

Religious Endowment—Right to nominate chela, if lost by his conviction in a criminal case.

The right of a Mohunt of a Muth to nominate his chela being a right appurtenant to the office, such right subsists so long as the office continues. The conviction of a Mohunt in a criminal case therefore does not incapacitate him from making an appointment of his successor to the office of Mohunt, (*Mukherji & S. K. Ghosh JJ.*)

GOBINDA RAMANUJ DAS MOHUNT *vs.* MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326 = 62 C.L.J. 153 = 164 I.C. 33.

Religious Endowment—Succession to properties endowed to mutt or Asthal, how regulated.

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Properties endowed to a Mutt or Asthal is held by the Mohunt as its owner, and the succession to him in such property follows with the succession to the office; the nature of the ownership is an ownership in trust for the Mutt or institution itself. Although large administrative powers are vested in the reigning Mohunt, the trust does exist and it must be respected. 43 Cal. 707 followed. (*Mukherje & S. K. Ghosh JJ.*)

GOVINDA RAMANUJ DAS MOHUNT vs.
MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326=62 C.L.J. 153=164 I.C.
33.

Religious Endowment—Properties of one Mutt, if can be transferred to another Mutt.

Transference of properties held in trust for the Mutt or institution in a way which deprives some beneficiary intended by the trust and which benefits some other beneficiary which the trust never contemplated is outside the powers of a mohunt. A mohunt cannot transfer properties dedicated to the worship of deities in one Asthal to another Asthal in deprivation of the former and to be applied to the worship of the deities in the latter, with a reservation that the latter Asthal should pay a fixed sum of money to the former. (*Mukherji & S. K. Ghosh JJ.*)

GOVINDA RAMANUJ DAS MOHUNT vs.
MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326=62 C.L.J. 153=164 I.C.
33.

Religious Endowment—Right of suit, if vests in deity.

The right of suit vests not in the deity, but in the shebait; and it makes no difference whether the idol sues as represented by the shebait or the shebait sues as shebait of the idol; the substance of the claim is the thing to be regarded. 54 I. A. 238 followed. (*Mukherje & S. K. Ghosh JJ.*)

GOBINDA RAMANUJ DAS MOHUNT vs.
MOHUNT RAM CHARAN RAMANUJ DAS.

63 Cal. 326=62 C.L.J. 153=164 I.C.
33.

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Religious Endowment—Power given to sisters to appoint shebait of a muth, if can be exercised by one of them independently of the other.

Where two daughters of the founder of a muth were given power to appoint 'shebait' to the math and the power was to be exercised jointly by the two sisters, neither sister has the power independently of the other to appoint 'shebait' to manage the property after her death. (*Thom & Raghpal Singh JJ.*)

RADHA NATH MUKHERJI vs. SHAKTI-
PADO MUKHERJI.

1936 A.W.R. 784=1936 A.L.J. 970.
184 I.C. 595=A.I.R. 1936 All. 624.

Religious Endowment—Daughters of founder of wakf given power to appoint shebait failure to execute their power-right to appoint shebait in whom vests.

Where a deed provided that the two daughters of the founder of the trust would have power to appoint shebait to the math and no provision was made in the deed in regard to the appointment of a 'shebait' upon failure of the two sisters validly to execute their power to appoint shebait as their successors, held, that the right to appoint 'shebait' to the muth devolved upon the legal representatives of the founder of the wakf. (*Thom & Raghpal Singh JJ.*)

RADHA NATH MUKHERJI vs. SHAKTI-
PADO MUKHERJI.

1936 A.W.R. 794=1936 A.L.J. 970,
184 I.C. 595=A.I.R. 1936 All. 624.

Religious Endowment—Debutter with line of shebait lawful up to a certain point and legality thereafter questioned by heir of founder—question, if may be raised when lawfully appointed shebait living.

Where in creating a debutter, the founder lays down a line of shebait which up to a certain point is in accordance with Hindu law but with regard to the next shebait it is alleged by an heir of the founder that their appointment is illegal, such question cannot be raised by the heir at a time

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when the lawfully appointed shebait is living but should be left over for determination after their death, if the question is then raised. (*D. N. Mitter & Patterson JJ.*)

BHUPATI NATH CHAKRAVARTI vs. BASANTA KUMARI DEVI & ORS.

63 Cal. 1098 = 43 C.W.N. 1320 = A.I.R. 1936 Cal. 556.

Religious Endowment—Failure of Shebait—appointment reverts to founder's family—fundamental change in devolution of Shebaitship—founder's power.

On failure of Shebait, the ordinary law is that the question of appointment will revert to the family of the founder. A fundamental change in the devolution of the office of the Shebat which is inconsistent with the terms of the original foundation, cannot be made even by the founder unless he has reserved the right to himself. 31 C. W. N. 177 relied on. (*S. K. Ghosh & Edgely JJ.*)

GURU PADA HALDAR vs. MONMOHAN MUKHERJI

162 I.C. 685 = A.I.R. 1936 Cal. 215.

Religious Endowment—Lady appointed Sarbarakaria and managing trust property validity of her appointment, if can be raised in a suit by her to recover Trust property.

Where a lady who had been appointed Sarbarakaria of a trust property and who had been managing the properties since her appointment, brought a suit on behalf of the idol for recovery of the trust property, and it was contended that she had not been properly appointed Sarbarakaria and was not entitled to bring the suit, held, that, as the defacto manager of the trust properties, had a right to bring a suit for recovery of the trust property and it was not necessary in such suit to see whether her appointment as Sarbarakaria was valid or not. (*Zia-ul Hossein J.*)

RADHA KRISHNA ASTHAPIT THAKUR-DWARA vs. Mst. MAHARAJ KUNWAR.

164 I.C. 919 = 1936 O.W.N. 728

Religious Endowment—Will restricting succession to eldest male lineal descendants

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of two persons—line of succession not permissible under Hindu Law—Succession if must be governed by ordinary Hindu Law of succession.

Where a person by his will created a religious endowment and appointed two of his sons to be shebait and provided that in the case of death, retirement or refusal to act, the office was to devolve on their eldest male descendant, and that the office should all along be held by the eldest for the time being in the male line of the said two sons, held, that the will in so far as it related to the holding of the office of shebait after the death of the sons constituted an invalid attempt to lay down a line of succession which was not permissible under the Hindu law. Therefore, in the death of the two sons the succession to the office of shebait was to be regulated by the ordinary Hindu Law of succession. (*Lord Thankerton J.*)

GANESH CH. DHUR vs. LAL BEHARI DHUR.

63 I.A. 445 = 41. C.W.N. 1 = 1936 O.W.N. 822 = 38 B.M. L.R. 1250 = 17 Pat. L.T. 801 = 17 M.L.J. 740 = A.I.R. 1936 P.C. 318 = 164 I.C. 347.

Religious Endowment—Religious office held by family—family arrangement with regard to that office, if may be given effect to.

In 1870, the members of a Hindu family who according to a scheme were entitled by rotation to trusteeship in a temple and to certain mirasi offices therein carrying emoluments, entered into a family arrangement by which they divided not merely their private property, but also the offices, etc., relating to the temple. The arrangement was affirmed in a subsequent arrangement between the parties in 1934. Subsequently one of the branches of the family having become extinct by the death of the sole representative of that branch, the question arose as to how the succession to the offices etc., held by that branch was to be regulated. Held, that the religious offices held by that branch of the family which had become extinct with the emoluments attached thereto went by succession, according

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to the law of inheritance applicable to private property. (*Venkatamana Row J*)

ALASINGA BHATTAR vs. VENKATASU-DARSANA BHATTAR & ORS'

70 M.L.J. 424=1936 M.W.N. 585=
43 M.L.W. 614=164 I.C. 52=A.I.R.
1936 Mad. 294.

Religious Endowment—Suit in name of idol by defacto manager of temple, if maintainable.

A suit can be brought in the name of an idol by a person who is the defacto manager of a temple, though he is not also the de jure manager. (*Sulaiman O. J. & Bennet J.*)

GOPAL DUTT vs. BABURAM.

1936 A.W.R. 412=1936 A.L.J. 515
=162 I.C. 349=A.I.R. 1936 All. 853.

Religious Endowment—Mourashi Mukarari patta granted by shebait for a large number of years—Suit for enhancement of rent—defendants, if bound to plead or adduce evidence of legal necessity.

Certain mourasi mukarari tenancies were created by a Shebait of certain deity by pattas granted in 1847. The succeeding shebait accepted the position that the tenancies were mourasi mukarari tenancies and the record of rights finally published in 1922 recorded the tenancies as tenancies held at fixed rent. In 1923, the shebait then holding office sued for enhancement of rent of the aforesaid tenancies on the ground of a rise in the price of staple food crops. *Held*, that having regard to the nature of the entries in the record of rights, it was incumbent on the plaintiff to make a definite case in his plaint with regard to the Pattas. He ought to have challenged them, and as they were not challenged, there was no obligation on the defendants to plead or adduce evidence of legal necessity. That even if it was open to the plaintiff to challenge the validity of the Pattas at the hearing on the ground that they were given without legal necessity and and therefore not binding on the Deity or the shebait, legal necessity could be inferred from the fact that the pattas had not been challenged for a large number of years

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by a number of succeeding shebait. The defendant could also adduce direct or indirect evidence of legal necessity, at the hearing and the fact that there was no recital of legal necessity in the pattas, did not prevent them from so doing. (*R. C. Mitter, J.*)

RAM KISHORE DAS MAHANTA vs. KEDAR PANDE.

63 P.L.J. 22.

Religious Endowment—Suit to recover possession of idol's property, if extends to stranger—suit by sons whose fathers have compromised the matter, if maintainable.

No doubt it is possible for a defacto Shebait or even a stranger to bring a suit to recover possession of the idol's property. But where a compromise has been effected between two persons regarding the possession of an idol's property, it is not open to them to get rid of the compromise by resort to a subterfuge by setting up their sons to fight the suit. In such a case, the sons can have no locus standi. (*S. K. Ghose & Edgely JJ.*)

GURU PADA HALDAR vs. MONMOHAN MUKHERJI.

162 I.C. 635=A.I.R. 1936 Cal. 215.

Religious Endowment—Permanent lease by manager or Dharmakarta of temple—Position and powers of successive managers—Receipt of rent by new manager—Effect and explanation of—Possession of lessee, if adverse to such new manager.

A permanent lease of temple property by the manager or Dharmakarta of a temple just like a similar lease by the head of a Math is not void ab initio causing limitation to run from the date of the lease. It is valid during the tenure of the grantor's office whether such office is terminated by death or some earlier event. Further the right of each successive manager to authorise, create or continue a new tenancy for the period of his managership must be taken in the case of a public temple or a family idol to be the same as in the case of a Math. Accordingly when a new manager accepts rent from a person who had obtained a permanent lease from his predecessor,

Hindu Law—(Contd.)

such receipt of rent is referable to a new tenancy and the possession of the lessee cannot be adverse until such manager's office terminates. (*Sir George Rankin.*)

DAIYA-SIKHAMANI PONNAM BALA DESIKAR vs. PERYANAN CHETTY.

63 I.A. 261=59 Mad. 809=40 C.W.N. 991=63 C.L.J. 491=38 Bom. L.R. 702 71 M.L.J. 105=1936 M.W.N. 733=44 M.L.W. 1=17 P.L.T. 480=1936 A.L.J. 977=1936 A.W.R. 975=38 P.L.R. 793=1936 O.W.N. 585=A.I.R. 1936 P.C. 183=162 I.C. 465.

Reversioner—Right of reversioner during life time of female owner.

During the subsistence of the life estate of a Hindu female, a reversioner has no right or interest in the property, which he can assign or relinquish. His right becomes concrete only on her demise, and until then it is a mere *spes successiones*. It follows, that if he is a minor, his guardian cannot bargain with it on his behalf or bind him by any contractual engagement in respect there to. (*Sir George Rankin.*)

MSST. BINDA KUER vs. LALITA PRASAD CHOWDHURY.

41 C.W.N. 161=38 Bom. L.R. 1256=17 P.L.T. 636=1936 O.W.N. 813=A.I.R. 1936 P.C. 304=164 I.C. 340.

Reversioner—Interest of reversioner during the lifetime of the widow.

Reversionary heirs have no vested interest in the estate held by a widow, because the husband's life is assumed to continue in the person of the widow. The succession therefore opens at the date of the death of the widow and on the death of the widow the estate goes to the next heir of the husband and not of the widow. (*Jaisil & Sale, JJ.*)

SHAKUNTALA DEVI vs. KAUSHALYA DEVI.

17 Lah. 356=38 P.L.R. 673=A.I.R. 1936 Lah. 125=162 I.C. 718.

Reversioner—Remedy open to a reversioner in case of alienation by a limited female owner.

Hindu Law—(Contd.)

In order to challenge an alienation made by a limited female owner, a reversioner may adopt one of the two courses; (1) he may during the lifetime of the female institute a suit for a declaration that the alienation is void as against him, or (2) he may wait till the female is dead and thereafter sue for recovery of possession of the property by avoiding the sale. In the former case, the suit must be brought within 12 years of the date of the alienation under Art. 125 of the Limitation Act and in the latter case, it must be brought within 12 years from the date of the death of the female under Art. 141 of the Limitation Act. (*Khawja Mahammad Noor & Varma, JJ.*)

BALDEO DAS vs. RAGHUNANDAN DAS.
17 P.L.T. 16.

Reversioner—Right of distant reversioners to be added as parties in a suit.

A suit by a reversioner for setting aside a certain alienation on the ground that the alienor was not the adopted son of the last male holder and had no right to make the alienation in question was decreed. An appeal preferred from the said decree having been compromised, by the contesting reversioners, certain remote reversioners applied to be added as parties for challenging the compromise as fraudulent. *Held*, that the application was a proper one, as the interest of the applicants were manifestly affected by the compromise. (*Courtney Terrell C. J. & Saunders, J.*)

GOKULANANDA HARICHANDAN vs. ISWAR CHHOTRAL.

15 Pat. 379

Reversioner—Reversioner not inheriting estate of intestate male due to existence of widow—Reversioner dying before widow—Estate if comes to the heirs of the reversioner.

Where a person who would have succeeded to the estate of an intestate Hindu male but has not done so owing to the existence of a widow dies before the widow,

Hindu Law—(Contd.)

the estate comes to the next heirs of such person. (*Jailal & Sale JJ*)

SHAKUNTALA DEVI vs. KAUSHALYA DEVI.

17 Lah. 356=38 P.L.R. 673=A.I.R.
1936 Lah. 125=162 I.C. 718.

Stridhan—Mithila School—Widow obtaining immovable property in lieu of mortgage debt advanced by husband—Nature of interest taken.

No doubt a mortgage is an interest in immovable property but nevertheless a mortgage debt is considered to be a movable property. Consequently, where a widow in consideration of a mortgage debt advanced by her husband obtains immovable property it becomes according to the Mithila School her absolute property. For, according to to that liability a widow takes an absolute right in the movable properties left by her husband and on her death it goes to her stridhan heirs. (*Maoperson & Khawja Mohammad Noor JJ*.)

LATUR RAI & ANR. vs. BHAGWAN DAS & ORS.

17 P.L.T. 372=167 I.C. 1063=A.I.R.
1936 Pat. 80.

Succession—Hindu convert dying as a or a Mahomedan—Reversioners, if entitled to succeed.

The law of succession in the case of a Hindu or a Mahomedan depends upon his own personal law. When once a person has changed his personal law, that law will govern the rights of succession of his children. Accordingly, where a Hindu convert dies as Mahomedan, his Hindu reversioners are not his heirs and have no right to succeed to his estate. 1930 A. L. J.

ABDUL AZIZ KHAN vs. MAHBOOB SINGH.

1936 A.I.R. 198=A. R. 1936 All. 202
=160 I.C. 48.

Succession—Presumptive reversioner, partitioning property with widow—Agreement, if binding on actual reversioner.

Hindu Law—(Contd.)

A Hindu died before 1926 leaving two widows, a step-mother, a sister, sister's son and three male collaterals, the latter being as it stood at the time then the nearest reversioners to the estate. There were some disputes in the family which were settled in 1927 by an agreement under which a portion of the estate was given to the reversioners absolutely and the remainder was left in possession of the widows for life. The sister was no party to the agreement. After the passing of the Hindu Law of Inheritance Amendment Act 1929, she brought the present suit for a declaration that the agreement would be binding on the actual reversioners to the estate. *Held*, that the plaintiff as sister had a reversionary right in the estate, and that as under the agreement she then presumptive reversioners had virtually partitioned the estate for their own benefit, they were not acting in a representative capacity and the agreement would not be binding on the actual reversioners. 57 Mad. 718 dissented from. (*Bennet & Bajpai JJ*.)

RAJPALI KUNWAR vs. SURJU ROY.

1936 A.L.J. 659=1936 A.W.R. 580=
A.I.R. 1936 All. 507 163 I.C. 756.

Succession—Self-acquired property—Interest of grandson when accrues.

The self acquired property of a Hindu father, though it cannot be regarded as ancestral property in relation to his son yet must be treated as such in relation to his grandson. A grandson born after the death of the grandfather acquires an interest in the property by birth, but when born during the lifetime of the grandfather, does not acquire any interest till the moment of the grandfather's death. (*Srivastava J.*)

MST. SIRTAJI vs. ALGU UPADHYA.

1936 O.W.N. 725=A.I.R. 1936 Oudh
331=1631 I.C. 936.

Succession—Daughters' right to succeed to father's estate—one of the daughters, if can alienate part of the estate.

Hindu daughters are in a legal sense one heir of their father and succeed to his

Hindu Law—(Contd.)

estate as joint tenants with rights of survivorship. One of two daughters holding the estate jointly is not entitled whether there is a legal necessity or not, to make an alienation of any part of that estate so as to bind her sister or the other reversioners. 26 A. L. J. 1174; 2 I. A. 113 relied on. (*Niamatullah & Allsop, J.J.*)

CHHATTAR SINGH vs. HUKUM KUNWAR

58 All 391=1936 A.L.J. 395.

Succession—Son of a Sudra male by a Brahmin widow, if entitled to inherit as a dasiputra

Any relationship between a Sudra male and a Brahmin female, whether it purports to be a relationship by so called marriage or a state of concubinage, is not recognised by Hindm Law, and children born of such union are regarded as chandals and outcastes. Such children are not dasiputras and cannot claim any right to a share in the property of their father. (*Divatia J.*)

RAMCHANDRA DODDAPPA NAIK & ANR. vs. HANAMNAIK DODNAIK PATIL & ORS.

60 Bom. 75=37 Bom. I.R. 920=A.I.R. 1966 Bom. 1.

Succession—Sister and step-sister's sons if heirs.

Under the Mitakshara School of Hindu Law a sister's son is an heir and so is also a step-sister's son. (*Tekchand & Dalip Singh J.J.*)

GURAN DITTA vs. Mst. JIWANI.

38 P.L.R. 80.

Widow—Nature of estate taken by a widow succeeding to her childless co-widow.

A widow succeeding to a childless co-widow as her stridhan heir gets an absolute estate in the property to which she has succeeded. (*Macpherson & Khawja Mohammad Noor J.J.*)

LATUR RAI vs. BHAGWAN DAS.

17 P.L.T. 372=160 I.C. 1083=A.I.R. 1936. Pat. 80.

Hindu Law—(Contd.)

Widow—Widow of deceased Hindu claiming latter's share as heir, and brother claiming by survivorship—Award finding brothers to have been joint and giving widow some property—Widow, if necessarily limited to widow's estate or may have absolute estate, if such given by award.

Where on a dispute between the widow of a deceased Hindu who claimed the latter's property as heir and his brother who claimed it by survivorship, the matter was referred to arbitration and by the award which found the brother to have been joint, the widow was given a part of the property, held, that the widow was not limited to a widow's estate by reason of the fact that her claim had been as her husband's heir, but she was entitled to an absolute estate which on a proper construction had been given to her by the award. (*Sir George Rankin*).

NATHULAL vs. BABURAM.

63 I.A. 155=40 C.W.N. 481=19 N.L.J. 62=1936 A.L.J. 686=1936 M.W.N. 499=1936 O.W.N. 481=1936 A.W.R. 153=181 I.C. 35=38 Bom. L.R. 462=17 P.L.T. 321=A.I.R. 1936 P.C. 103.

Widow—Powers of alienation.

The power of a Hindu widow to alienate the estate inherited by her for purposes other than religious or charitable, is analogous to that of a manager of an infant's estate as described in Hanooman Persand's case. She can alienate it, not only for legal necessity, but also for the benefit of the estate. (*Sir Shadi Lai*.)

VENKATA HANUMANTHA BHUSANA RAO GARU vs. GADE SUBBAYA.

64 C.L.J. 141=41 C.W.N. 81=1936 O.W.N. 705=38 Bom. L.R. 1229=17 P.L.T. 886=44 M.L.W. 414=1936 A.W.R. 991=1936 A.L.R. 1191=1611 I.C. 27=A.I.R. 1936 P.C. 283.

Widow—Pious observancy for which Hindu widow may alienate property.

The "pious observancy" on which a Hindu widow may spend money by aliena-

Hindu Law—(Contd.)

ting her husband's estate must be such as to conduce to the bliss of the deceased owner's soul. It is not competent to a Hindu widow to alienate any portion of her husband's property for her own spiritual benefit, especially when it is accompanied by a temporal benefit to one of the possible reversioners to which she is not entitled. (*Dhale & Agarwalla, J.*)

SURAJ KUMAR SINGH & OHS. vs. RADHA KRISHNAJI.

17 P.L.T. 774.

widow—Alienation to meet expenses of litigation—Onus of proving necessity,

Where a widow purports to alienate a portion of her husband's property in order to meet the expenses of litigation incurred for the protection of the estate, necessity is not established unless it is proved by the alienee that at the time the money was actually advanced, there was not money in the hands of the widow sufficient for the protection of the estate. (*Ranjilai, J.*)

OFFICIAL RECEIVER, DELHI vs. KISHEN LAL.

16 I.C. 922=A.I.R. 1936 Lah. 98.

widow—Transfer by widow—legal necessity if may be presumed from mere lapse of time.

When the question is whether a certain transfer by a Hindu widow was justified by legal necessity, such necessity cannot, as a matter of law, be presumed from mere lapse of time. Regard must be had to the amount of evidence likely to be available after the lapse of long time and presumptions may be allowed to fill in gaps disclosed in evidence. But when there is evidence justifying the conclusions that there was no legal necessity, presumption not to supplement but to contradict the evidence would be out of place. 47 I. A. 8 explained. (*Lord Roche.*)

BHOJRAJ vs. SITARAM.

40 C.W.N. 257=1936 A.W.R. 37=70 M.L.J. 225=1936 M.W.N. 184=35 P.L.R. 69=19 N.L.J. 36=A.I.R. 1936 P.C. 80=160 I.C. 45=38 Bom. L.R. 344=63 C.L.J. 42=1936 A.W.R. 37=1936 A.L.J. 755=43 M.L.W. 120=1936 O.W.N. 35.

Hindu Law—(Contd.)

Widow—Alienation for charitable purpose—limits of.

A female owner can make an alienation of a merely fraction of the estate for the continuous benefit of the soul of the deceased owner. But she cannot gift away very valuable properties for such purpose. 44 All. 503 relied on. (*Harries & Raohpal Singh JJ.*)

SOHON LAL vs. MST. BHAGABATI.

1936 A.L.J. 180=1936 A.W.R. 93=A.I.R. 1936 All. 205=161 I.C. 610.

widow—Alienation by co-widow succeeding to the share of her co-widow for performing Gaya Sradh of her husband, to what extent valid.

Alienations made by a co-widow succeeding to the share of her co-widow, of her interest in property as well as the interest of the co-widow to whom she succeeded, for performing the Gaya Sradh of her husband are valid not only to the extent of the share of the alienating widow but also to that of the deceased widow. (*Macpherson & Khwaja Mohammad JJ.*)

LATUR RAI vs. BHAGWAN DAS.

17 P.L.T. 372=160 I.C. 1083=A.I.R. 1936 Pat. 80.

Widow—Alienation without legal necessity followed by surrender to next reversioner—reversioner, if entitled to immediate possession.

Where a widow after alienating a portion of her husband's estate without legal necessity surrenders the whole of her interest in the State to the next reversioner, the reversioner is not entitled to immediate possession of the portion so alienated but must wait for possession until her death. The reason for this rule is that though the reversioner is not bound by the alienation made by the widow, the widow herself is bound by the alienation during her lifetime and as such the possession of her transferee cannot be disturbed so long as the widow is alive. (*Thom & Iqbal Ahmed JJ.*)

GOPAL DAS vs. SRI THAKURM.

A.I.R. 1936 All. 422.

Hindu Law—(Contd.)

Widow—Mortgage by widow for paying husband's debt—subsequent mortgage at higher rate for paying off prior mortgage, if binding on the estate.

Where in order to pay a debt of her husband, a widow granted to the creditor a mortgage of a property which was advantageous to the estate and therefore finding, and thereafter being unable to pay the debt, she granted another mortgage of the same property to the same creditor for a larger sum and at a higher interest, *held*, that the subsequent mortgage being necessary consequence of the first mortgage was binding on the estate, but that the provision for compound interest on arrears of instalments at a rate higher than the rate of simple interest in the principal sum was penal and could not be enforced.

VENKATA HANUMANTHA BHURANA
RAO GAAU v. GADE SUBBAYA.

64 C.L.J. 141 = 41 C.W.N. 18 = 1936
O.W.N. 705 = 38 Bom. L.R. 1229 = 17
P.L.T. 888 = 44 M.L.W. 414 = 1936
A.W.R. 991 = 1936 A.L.J. 1191.

widow—Mortgage by widow—suit by mortgagees after long period has lapsed—paucity of evidence of legal necessity if can be supplemented by presumption.

Where in the case of a bond executed by a Hindu widow, the reversioners bring a suit after a long period, when it is extremely difficult for the transferees to produce satisfactory evidence of legal necessity, paucity of evidence may be treated with indulgence and can be supplemented by presumption. But where the suit is brought by the mortgagees and they themselves are responsible for the long period of time which has elapsed, the Court has to see whether they have or have not discharged the onus which lay up on them of proving legal necessity. (*Rachhpal & Colster, JJ.*)

TEJ BAHADUR vs. FIRM RADHA KISEN, GOPI KISEN.

1936 A.L.J. 1373 = 1936 A.W.R. 1044
= A.I.R. 1936 All. 848.

widow—Mortgage by widow of husband estate jointly with next reversioner for bene-

Hindu Law—(Contd.)

fit of latter—property how far liable for satisfaction of debt.

When a Hindu widow executes a mortgage of her husband's estate jointly with the next reversioner for the benefit of the latter, the mortgaged property is liable for the satisfaction of the mortgage debt only to the extent of the widow's life estate therein, (*Guha & Khondkar, JJ.*)

SM. ANNAMOYI DASSI vs. UMESH CHANDRA GHOSH.

46 C.W.N. 339.

widow—Suit on pronote against widow—nothing to show that creditor wanted to implead reversioners—right of the reversioners if affected.

Where a suit on a pronote executed by a widow was filed in her lifetime, and the reversioners were not impleaded in the suit, nor was there anything to show that the creditor wanted to make the reversioners a party to the suit, *held*, that the rights of the reversioners remained unaffected, and the decree obtained by the creditor could not be enforced by the attachment of the husband's estate. (*Varma & Rowland JJ.*)

GHASIT MIAN vs. PANCHANAN SINGH & ORS.

17 P.L.T. 736.

widow—Suit by reversioner for declaration that sale by widow is null and void—suit decreed and certain sum held as lawful consideration—import of the decree.

Where a declaratory suit by a reversioner praying that a sale deed by a Hindu widow be declared null and void and if any amount of the sale consideration be found to be lawful, proper orders may be issued, is decreed, and it is held that a certain sum is a lawful consideration, the import of the decree is that when the reversion opens, the reversioner would be entitled to obtain possession of the property on payment of the lawful consideration. (*Bajpai J.*)

MST. MAINA vs. BHAGWATI PRASAD.

1936 A.W.R. 591 = 1936 A.L.J. 1230
= A.I.R. 1936 All. 5572 164. I.C. 193.

Hindu Law—(Contd.)

Widow—Alienation by widow—legal necessity proved—reversioners if can contend that some other property than the one sold, should have been alienated.

Where the existence of legal necessity for an alienation is not disputed, a reversioner after the death of the widow is not entitled to impeach the alienation on the plea that the property disposed of should not have been alienated, but some other property should have been sold to meet the legal necessity. (*Henderson & Nasim Ali J*)

FANI LAL MALLICK vs. CHUNI LAL HALDAR.

62 C.L.J. 390.

Widow—Alienation by Hindu widow of husband's estate and subsequent surrender to next reversioner—reversioner, if may challenge alienations in excess of powers immediately or must wait till widow's death.

Although an alienation by a Hindu widow of her husband's estate ordinarily holds good for the period of her life even though not justified by legal necessity, still on a surrender by the widow of the said estate and consequent extinguishment of her title, the prior alienations in excess of her powers are liable to be challenged by the reversioner immediately just as they could be impeached on her death, inasmuch as such civil death operates in the same way as natural death to terminate the intervening widow's estate, and in as much as the reversioner gets the property freed from any alienations in excess of the power of the widow and from the debt of the surrender. The reversioner in such a case has not to wait till the widow's death, 52 Cal. 1018 approved. (*D. N. Mitter & Rau JJ.*)

RAMKRISHNA PRODHAN vs. KAUHLAYA MONI DAS.

40 C.W.N. 208

Widow—Widow holding position of co-sharer in an undivided village realising under a decree for profits more than the

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Hindu Law—(Contd.)

amount due—Application for restitution under Sec. 144, C. P. C.—Death of widow—Estate in the hands of reversioners, if liable.

When a Hindu family who has possession over a estate for her life sues the co-sharer for profits, she does so in a representative capacity. If the widow realises from another co-sharer more than the amount due, then the liability for a refund of the excess amount realised, would rest on the estate and so the estate would be liable. Accordingly, a co sharer in an undivided village, who has been made under a decree of a Court, to pay a sum in excess of the amount due to a Hindu family holding the position of a co-sharer is entitled to get back the excess amount from the estate in the hands of the reversioners after the death of the widow. (*Rachhpal Singh J.*)

KISHAN LAL vs. MD. ISHAQUE.

1936 A.L.J. 309=1936 A.W.R. 443
161 I.C. 523=A.I.R. 1936 All. 594.

Widow—Widow alienating portion of husband's estate for justifiable cause—Remainder of the estate, if can be validly surrendered.

Whenever any portion of what was once the estate of the husband has ceased legally to belong to it by reason of alienation, binding upon the estate, the conception of the entirety of the estate to be surrendered must be reasonably applied only to the existing estate. (*Varadachariar J.*)

RAMAYYA vs. PAPANAMMA.

A.I.R. 1936 Mad. 16=160 I.C. 368.

widow—Surrender by widow in favour of minor reversioner, if valid.

There is no rule which precludes a surrender being made in favour of a minor reversioner and there is nothing particularly onerous about the surrender deed, by reason of which, its validity remain in suspense till the minor attains majority. (*Varadachariar, J.*)

RAMAYYA vs. PAPANAMMA.

160 I.C. 368=A.I.R. 1936 Mad. 16,

Hindu Law—(Contd')

Will—Will by a coparcener—bequest of a portion of property in favour of daughter with consent of the remaining coparcener—validity of the bequest—request to co-parcener to carry out directions in the will, if mere request or amounts to disposition of property.

The testator, with his brother constituted a joint Hindu family executed a will bequeathing all the properties to his brother, who however was to act according to the directions in the will. One of such directions was that on the marriage of the testator's daughter the brother should execute a Stridhan deed conveying certain lands absolutely to the daughter who was to own and possess the same from son to grandson. In default of the brother so doing, the daughter should take the same as if bequeathed on her by the testator. The will was attested by the brother and got registered by him. *Held*, that the will was invalid as a testamentary disposition by reason of the fact that it dealt with ancestral property, but the disposition in favour of the daughter was valid as a family arrangement, because it was a bequest by a father of a reasonable portion of the ancestral property and since the bequest was made with the consent of the sole remaining co-parcener. The disposing of the property in favour of the daughter was not a mere record of a promise made by the consenting brother, but was a bequest in favour of the daughter, which conferred title on her whether or not the brother executed a deed. (*Beasley C. J. & King J.*)

VENKOBASA H. vs. RANGANAYAKI AMMAL.
44 M.L.W. 453 17 M.L.J. 454 = 1936, M.W.N. 781 = A.I.R. 1936 Mad. 967.

HINDU LAW OF INHERITANCE AMENDMENT ACT (II OF 1929.)*Application of the Act.*

The Hindu Law of Inheritance Amendment Act, 1929 applies to the case of a person who died before the Act came into force, if his widow who had inherited his estate was alive at the time of its enforcement. 13 Lah. 178 followed; 57 Mad. 718 & 34 P. L. R. 964 distinguished; 1932 A. L. J. 884 applied. (*Joi Lal J.*)

SHAKUNTALA DEVI vs. KAUSHALYA DEVI.
A.I.R. 1936 Lah. 124 = 162 I.C. 718 = 17 Lah. 356 = 36 P.L.R. 673.

Hindu Law of Inheritance Act—(Contd.)

Application—Provisions of the Act, if have retrospective effect.

The Hindu Law of Inheritance Amendment Act, 1929, is applicable to cases where the last male owner had died before the Act came in to force, but the succession to the estate opened on the death of the widow or other limited owner after the passing of the Act. (*Sulaiman C. J. & Bajpai J.*)

RAJPALI KUNWAR vs. SARJU ROY.

1936 A.L.J. 659 = 1936 A.W.R. 580 = A.I.R. 1936 All. 507 (F.B.) = 163 I.C. 756

Male governed by Mitakshara Law dying before the Act—Widow alive when Act came into force—Provisions of the Act, if applicable.

The Hindu Law of Inheritance Amendment Act applies to a case in which a male governed by the Mitakshara Law died before the date on which the Act came into force leaving a widow who was alive on such date. (*Joi Lal & Sale JJ.*)

MT. SATTAN vs. JANKI.

38 P.L.R. 765 = A.I.R. 1936 Lah. 139 = 163 I.C. 480.

Application of the Act—mother succeeding to property of her son and executing a gift in favour of her daughter—effect of.

The Hindu Law of Inheritance (Amendment) Act 1929, applies even to cases where the last male Hindu owner of the property had died prior to the coming of that Act, in force. After the passing of the Act the sister has obtained a reversionary right to the estate of her brother. Therefore where a mother who had succeeded to the property of her son who had died prior to 1929, executed a gift of it to her daughter, and the reversionary heirs of the deceased son sought to have the deeds set aside *held*, that the gift was not void, and the deed of gift executed by the mother had the effect of accelerating the interest in favour of the daughter. (*Nanavutty & Smith JJ.*)

DEOKI NANDAN vs. Mst. SUKRWANTI.

1936 O.W.N. 712 = 164 I.C. 674.

Hindu Law of Inheritance Act—(Contd.)

Sec 2—Sister—right to succeed after death of grand-mother.

Where a Hindu dies leaving his grand-mother and his sister, in the presence of the grand-mother, the sister cannot succeed, but on the death of the grand-mother the sister would succeed even through the last male owner died before the Act came into force. (*Sulaiman C. J. & Bennet J.*)

RAJDEO SINGH vs. JANAKRAJ KAURI.
1936 A.L.J. 64=1936 A.W.R. 56=
A.I.R. 1936 All. 154=161 I.C. 353.

HUSBAND AND WIFE.

Marriage—Suit for declaration that certain person is wife of plaintiff—what plaintiff must prove.

Where in a suit for a declaration that a certain person is the wife of the plaintiff, the factum of marriage and alternatively its validity are denied, *Held*, that it is the duty of the plaintiff to prove not only that a marriage was performed, but that it was validly and legally performed. (*Collister J.*)

RAM DULARI vs. DEO NARAIN.

1936 A.L.J. 1130=1936 A.W.R. 1139
=A.I.R. 1936 All. 875.

Marriage—Validity of marriage, how far affected by misrepresentation or concealment.

Fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage unless any of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without real consent to the marriage. A marriage might also be invalid if the girl was abducted by force or fraud and married against her wish or that of her guardian. The test of validity is whether there was a real consent to the marriage. (*Walia J.*)

BAI APPAIBAI vs. KHIMJI COOVERJI.

60 Bom. 455=38 Bom. L.R. 77=A.I.R.
1936 Bom. 138=162 I.C. 188.

Husband and Wife—(Contd.)

Suit for restitution of conjugal rights—Cause of action when arises.

The cause of action in a suit for restitution of conjugal rights arises from the duty of the wife to reside with her husband unless he has been guilty of some matrimonial offences which justifies her in the eye of law in living apart from him. The fact that the wife had not previously lived with her husband within the jurisdiction cannot make any difference, neither the fact that the marriage was not consummated can make any difference (*Beasley C. J. & Stodart J.*)

VENUGOPAL NAIDU vs. LAKSHMI AMMAL.

59 Mad. 362=1936 M.W.N. 19=70
M.L.J. 286=161 I.C. 485=A.I.R. 1936
Mad. 288.

Suit for restitution of conjugal rights—discretion in granting relief.

The relief in a suit for restitution of conjugal rights is discretionary. The question has to be decided according to the personal law of the parties and according to principles of justice, equity and good conscience so far as they are not inconsistent with it. Relief is generally refused by the Court when there has been long delay instituting the suit. 34 I. C. 538 and 73 I. C. 896 relied on. (*Bhide J.*)

MT. BANU vs. GHULAM MUSTAFA KHAN
A.I.R. 1936 Lah. 752=165 I.C. 961.

Desertion—What constitutes.

There is no judicial definition of desertion that can be applied to meet the facts of every case for the facts which constitute desertion vary with the circumstances and the mode of life of the married person. There must however be clear evidence of the intention on the part of one of the spouses to break off matrimonial relation with the other, for desertion is in its essence the abandonment of the one by the other with the intention of forsaking him or her. It is the party who intends to bring the cohabitation to an end and whose conduct in reality causes its termi-

Husband and Wife—(Contd.)

nation that commits the act of desertion.
Wadia J.)

BAI APPIBAI vs. KHIMJI COOVERJI.

60 Bom. 455=36 Bom. L.R. 77=A.I.R.
1936 Bom. 138=162 I.C. 188.

Wife's authority to bind husband for necessities.

A wife has implied authority to pledge the credit of her husband for necessities life. If the same acknowledged to be due to a creditor by the wife represents the price of household articles intended for the family consisting of the husband and the wife, and if they can be considered to be necessary for person in the position of life occupied by the husband and the wife, the Court may well infer that the wife had authority to bind the husband. (*Niamatulla J.*)

BABULAL BHAGWAN DAS vs. MR. PURSELL.

1936 A.W.R. 1037.

Liability of husband for goods purchased by wife on credit.

The liability of a husband for his wife's debts depend on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what his wife has done. Where there is no evidence to show that the wife has either express or implied authority of her husband to pledge his credit, the husband is not liable for the price of articles purchased by his wife. 9 All. 147 relied on. (*Rachpal Singh J.*)

ROBINSON vs. MRS. R. V. RIGG.

1936 A.W.R. 158=1936 A.L.J. 50=
=16 I.C. 874=A.I.R. 1936 All. 293.

HYPOTHECATION.

Rights under hypothecation, how to be decided.

The effect of hypothecation is to be decided on principles of equity, and accordingly where there is a dispute as to the priority between two hypothecatees the principle of *qui prior est jure* should apply.

Hypothecation—(Contd.)

23 Cal. 592 & 22 C.W.N. 768 considered.
(*Buckland J.*)

BIBHUTI BHUSAN SHOME vs. BAIDYA-NATH DE.

40 C.W.N. 625.

IMPARTIBLE ESTATE.

Estate existing from Per-British times—Regrant or settlement in British time—Original incidents, if retained.

If an impartible estate existed as such from before the advent of the British Rule, settlement or re-grant thereof by the British Government must in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to have the effect of continuing the estate with its previous incidents of impartibility and succession by special custom. (*Gruer & Neogi A. J. C's.*)

RATAN SINGH CHEATRI vs. JAIRAM SINGH CHEATRI.

31 N.L.R. 191=A.I.R. 1936 Nag. 80.

INCOME TAX.

Assessment of tax set aside by High Court—Refund of tax paid—Commissioner, if can demand guarantee from assessee for paying back the amount, if assessment was levied again.

Where an assessment of income tax is set aside on a reference made to the High Court, the Commissioner cannot impose as a condition of refund of the tax paid that the assessee should undertake to be responsible for paying back the amount in case an assessment was levied again or the matter was taken on appeal to the Privy Council. (*Sir George Rankin.*)

COMMISSIONER OF INCOME TAX, BOMBAY vs. BOMBAY TRUST CORPORATION, LTD.

63 I.A. 408=41 C.W.N. 33=84 C.L.J.
194=1936 A.W.R. 58=1936 A.L.J.
1204=A.I.R. 1936 P.C. 269=164 I.C.
18.

INCOME TAX ACT (XI OF 1922).

Sec. 2 (1)—Remuneration for collection for land revenue—provisions of the section, if applicable.

Sec. 2 (1), Income Tax Act, applies to the case of a person who gets agricultural income from the use of the land by direct

Income Tax Act—(Contd.)

operation. It is not applicable to a person who gets certain fees which constitutes his remuneration for the work of the collection of the land revenue. (*Addison and Abdul Rashid JJ.*)

H. T. CONVILLE vs. COMMISSIONER OF INCOME TAX, PUNJAB.

38 P.L.R. 402=161 I.C. 681=A.I.R. 1936 Lab. 595.

Secs. 2 (9) & 14 (1)—*Hindu assessee with no coparceners, living with other members in joint family, if may be assessed on footing of Hindu undivided family—Assessee having coparceners, if may be so assessed in respect of income of property not ancestral in origin and not thrown into common stock.*

The words "Hindu undivided family" in the Income tax Act means Hindu co-parcenary and not a Hindu Joint family in the wider sense of several members living together, irrespective of the existence or non-existence of any coparcenary property. Consequently whether the property in the hands of a Hindu assessee is ancestral or self-acquired, when he has no coparceners (for example, when he has no son and other members of his family are females) there is no Hindu undivided family within the meaning of the Income Tax Act. Even when there are members capable of being coparceners, if the property is not in its origin ancestral and neither the property nor its income has ever been thrown into the common stock but has been treated as separate, its income cannot be treated as the income of a member of a Hindu undivided family. (*Lort Williams & Jack JJ.*)

MOOLJI SICKA IN THE MATTER OF.

40 C.W.N. 517.

Sec. 3—*Co-owners appointing common collecting agent—association of individuals if constituted.*

The expression of "other association individuals" in Sec. 3, Income Tax Act, should be construed *ajudem generis* with the word immediately preceding, that is,

Income Tax Act—(Contd.)

the word "firm". Thus before there can be association of individuals within the meaning of the Section, it must be first shown that the association has at least some of the attributes of a firm or partnership, though not strictly in the legal sense of the term. The mere appointment by a body of co-owners of a common collecting agent will not convert such body of co-owners into an association of individuals within the meaning of Sec. 3 of the Act, (*Collier & Bajpai JJ.*)

MOHAMMED ASLAM vs. COMMISSIONER OF INCOME TAX, U.P.

1936 A.W.R. 993=1936 A.I.J. 1109
=A.I.R. 1936 All. 817.

Sec. 3—*Income escaping assessment due to certain device adopted by assessee—Department, if can assess income in subsequent year when device discovered;*

The mere fact that a certain income has not suffered tax because of a device adopted by the assessee would not enable the department to assess the same for subsequent years when the device becomes apparent to the department. It is only where according to a particular system adopted by the assessee, allocations are made not in the year when the amount is received but in latter years, that the income so allocated can be said to be the income liable to be considered in the assessment year. (*Bajpai & Mulla JJ.*)

RATAN CHAND LALLOO MAL, IN RE.

1936 A.I.J. 549=1936 A.W.R. 431=
A.I.R. 1936 All. 279=163 I.C. 324.

Sec. 3—*Assessee keeping books on cash basis—basis on which calculations must be made,*

Where an assessee keeps his books on a cash basis disclosed to the revenue authorities and the officer accepts that basis, the calculation must be based on actual receipts for the year of computation. (*Bajpai & Mulla JJ.*)

RATAN CHAND LALLOO MAL, IN RE.

1936 A.I.J. 549=1936 A.W.R. 431=
A.I.R. 1936 All. 279=163 I.C. 324.

Income Tax Act—(Contd.)

Secs. 3 & 48—*Association incorporated under the Companies Act—liability to assessment—non-applicability of.*

An association incorporated under Sec. 26 of the Indian Companies Act, as an association limited by guarantee not existing for earning profits, and prohibited under the law from declaring any dividends to its members, is liable to assessment, even though no relief under Sec. 48 of the Act is available to such an association, as in case of other associations, not incorporated under Sec. 26 of the Companies Act. (*Bajpai & Collister, JJ.*)

CHAMBER OF COMMERCE, HAPUR, IN RE.

1936 A.W.R. 664 = 1936 A.L.J. 1085 =
A.I.R. 1936 All. 764.

Secs. 3, 9 & 55—*Persons joining together for buying, holding and using property, if constitute "association of individuals."*

If several persons join together for the purpose of buying or holding or using a certain property, in order to make gain by it, they become thereby an "association of individuals" within the meaning of Secs. 3 and 55 of the Indian Income Tax Act. The said association can be said to be the owner of the property within the meaning of Sec. 9 of the Income Tax Act. (*Derbyshire C. J. & Costello J.*)

B. N. ELIAS IN RE.

83 C.L. 538 = 40 C.W.N. 476.

Sec. 3 & 55—*Partnership consisting of firms and undivided Hindu Family—shares of members of firms not mentioned in partnership deed—such partnership if constitutes a firm.*

Where a partnership union purports to consist of two firms and one Hindu undivided family, and the shares of the member of the firms are not mentioned in the deed of partnership which undoubtedly a trading concern does not fall within the definition of the word "firm" as given in the Income Tax Act, it is more appropriate to regard

Income Tax Act—(Contd.)

it as "other association of individuals" (*Addison & Abdul Rashid JJ.*)

MAIN CHANNU FACTORIES UNION vs.
COMMISSIONER OF INCOME TAX, PUNJAB.

A.I.R. 1936 Lah. 548.

Sec. 4—*Profits or gains, if something other or further than income.*

The terms "profits and gains" in the Indian Income Tax Act do not expand the conception underlying the term "income" and nothing further than income is taxable under the terms "profits and gains." (*Lord Thankerton.*)

COMMISSIONER OF INCOME TAX BENGAL vs. MERCANTILE BANK OF INDIA LTD., & ORS.

63 I.A. 451 = 40 C.W.N. 1189 = 17
P.L.T. 613 = 1936 A.W.R. 820 = 1936
A.L.J. 904 = 38 Bom. L.R. 295 = 71
M.L.J. 525 = A.I.R. 1936 P.C. 238 =
I.C. 163 423.

Sec. 4—*Word 'received' used in the section—actual transfer and receipt in British India, if indicated.*

The trustees of a patsala at Kunnakudi who carried on money lending business outside India in Penang and elsewhere deposited certain money with the Tinnevely shop of the assessee. When he applied for repayment, the assessee issued two hundies on his Penang shop for the amount due with interest, and the said shop duly paid the amounts. The transactions relating to the discharge of the debt and the payment were recorded in the Penang folio of the Tinnevely books and in the Tinnevely folio of the Penang books. The question was whether the amount in question was received in British India within the meaning of Sec. 4 (2), Income Tax Act. *Held*, that the amount was to be treated as a remittance of foreign profits in British India. (*Madhavan Nair, Stone & King JJ.*)

SUBRAMAYAM CHETTIAR vs. COMMISSIONER OF INCOME TAX.

59 Mad. 171 = 43 M.L.W. 124 = 159 C.
787 = A.I.R. 1936 Mad. 262.

Income Tax Act—(Contd.)

Sec. 4—Profits capitalised by Company and distributed to shareholders as capital income in the form of debenture, if income, profits or gains of shareholders.

When a Company resolves to distribute its accumulated profits among the shareholders as a bonus and at the same time purporting to increase its capital, serves both purposes of capitalising the profits and granting a capital bonus in the form of debentures issued to the shareholders proportionately to their interest—the debentures satisfying the bonus and the profits awarded to the shareholders but retained by the Company forming the consideration for the debentures—no income, profits or gains accrue to or are received by the shareholders to be taxed under the Income Tax Act. If the Company has in fact capitalised the profits, the personal motive or purpose of the individual shareholders, even if they hold a controlling interest, is irrelevant. *(Lord Thankerton.)*

COMMISSIONER OF INCOME TAX BENGAL vs. MERCANTILE BANK OF INDIA, LTD., & ORS.

63 I.A. 451=40 C.W.N. 1189=1936 A.W.R. 820=17 P.L.T. 613=1936 A.L.J. 904=38 Bom. L.R. 995=71 M.L.J. 525 (P.C.)=A.I.R. 1936 P.C. 238=163 I.C. 425.

Sec. 4 (1)—Assessee carrying on business in Bombay entering into contracts with person outside British India through brokers—profits from such business if taxable.

The assessee who was a merchant in Bombay entered into contracts of sale and purchase with foreign merchants through brokers in such foreign lands. The assessee was assessed to income tax in respect of profits from such business, although it was admitted that such profits had not been received in British India. *Held*, that the profits made by the assessee could not be said to have accrued or arisen in the British India so as to render them liable to be taxed under Sec. 4 (1) of the Income Tax Act, 1922. *(Beaumont C. J. & Rangnekar, J.)*

COMMISSIONER OF INCOME TAX BOMBAY vs. CHUNILAL MEHTA.

59 Bom. 719.

Income Tax Act—(Contd.)

Sec. 4 (2)—Assessee receiving pension in United Kingdom—payments not brought in India—income if can be said to arise in India.

Income cannot be said to accrue or arise in a particular country by reason of the fact that it is earned in that country. On the contrary it accrues or arises in the country where there is a right to demand payment of it or where in fact it is paid. Where an assessee receives in the United Kingdom payments of pensions granted by the Madras Government under the Civil Service Regulation of the Govt. of India, such payment if not brought into British India are not income accruing on arising in British India. 52 Cal. 1 followed, 54 All. 223 dissented from. *(Addison & Abdul Raschid, JJ.)*

VEJOY RAGHAVA CHARYA vs. COMMISSIONER OF INCOME TAX, LAHORE.

38 P.L.R. 911=165 I.C. 843=A.I.R. 1936 Lah. 713.

Sec. 4 (3) (i)—Firm established for improvement of horse breeding—No trust deed—Money particular by spent for non-charitable purposes—Income if exempt from tax.

An institution established for the purpose of improving horse breeding in India for providing remounts for the regiment derived its income from agriculture, securities and other sources. It was claimed that the income was exempt from the payment of tax under Sec. 4 (3) (i) of the Income Tax Act. There was no trust deed and the disbursement of the funds was in the hands of the officer commanding. It was found that the money out of the funds had been spent for bonuses paid to farewell parties and wedding parties. *Held*, that these payments did not justify a conclusion that the property was held in trust only for charitable purposes and in the absence of any charitable purpose, the trust failed as a charitable trust for want of certainty as to its object. Under the circumstances the income of the institution was not exempt from taxation under Sec. 43 (1). *(Addison, A. C., J & Din Mohammad J.)*

PROBYNABAD STUDD FIRM vs. COMMISSIONER OF INCOME TAX, PUNJAB.

A.I.R. 1936 Lah. 602=168 I.C. 141.

Income Tax Act—(Contd.)

Sec. 4 (3) (ii)—*"Charitable" meaning of—Association to facilitate trade, founded for the benefit of its members, if "charitable"*

The word "charitable" in Sec. 4, Sub Sec. (3), cl. (ii), Income Tax Act, has a technical significance other than the meaning which it bears in common parlance. Before an institution can be held to be "charitable" there must be an element of altruism; that is to say the beneficiaries must not be able to claim the benefit. Where the ostensible object of an association is to provide facilities of trade and to improve business and there is no priority between the association and outsiders and it is a "mutual concern" of the members who compose the association, the association cannot be said to be a "charitable institution" within the meaning of, cl. (ii), sub sec. (9) of Sec. 3 of the Act. (*Bajpai & Collister JJ.*)

CHAMBER OF COMMERCE, HAPUR
IN RE.

1936 A.W.R. 664=1936 A.L.J. 1085
=A.I.R. 1936 All. 764

Sec. 4 (3) (viii)—*Usufructuary mortgage of agricultural land—income from land taken in lieu of interest, if liable to income-tax.*

When an agricultural land is mortgaged, and the mortgagee receives the income from the land in lieu of interest on the debt, affix for all purposes stands on the position of a land-holder, the income from the land is agricultural income and hence not assessable. (*Bearsly C. J., Ramesam & King, JJ.*)

COMMISSIONER OF INCOME TAX, MADRAS
vs. JANAB HAJEE MOHAMMAD SADAK
KHAYEE SAHIB.

1936 M.W.N. 162=70 M.L.J. 24=
A.I.R. 1936 Mad. 144=160 I.C. 948.

Sec. 4 (4) (vi)—*Income of a "mutual concern" association derived from fees from members on transactions registered in the association—Income, if taxable as income from "other sources".*

Income Tax Act—(Contd.)

Where the income of an association, a mutual concern to promote trade and commerce is derived from its members only in the shape of a certain fixed amount on each transaction registered in the association, and it is conceded by the Income Tax Commissioner that such income is not "income" from "business" within the meaning of Sec. 6 (6) (iv), Income Tax Act, the income is not taxable as income from "other sources" within the meaning of Sec. 6 (iv) of the Act, as it is difficult to see from what "other source" a mutual concern can derive profits. (*Bajpai & Collister JJ.*)

CHAMBER OF COMMERCE, HAPUR,
IN RE.

1936 A.W.R. 664=1936 A.L.J. 1085=
A.I.R. 1936 All. 764.

Secs. 7 & 12—*Amount directed by testator to be spent out of income on his Adya-Sradh ceremony and cost of obtaining probate of Will, if may be excluded from income of his executors & trustees.*

In computing the chargeable income of the executors and trustees of a deceased Hindu, a sum directed by the latter's will to be spent on his Adya Sradh ceremony out of the income of his property or even that part of it which was actually spent, cannot be excluded. Nor can the costs of obtaining a probate of the will be excluded, although the deceased may have by his will directed such costs to be paid out of the income. Both are cases of the application by the trustees under the directions of the testator of a part of the income in a particular way and not the allocation of a sum out of the income, before it became an income in their hands. (*Derbyshire C. J. & Costello J.*)

P. C. MALLICK & ANR. *In the matter of.*

40 C.W.N. 527.

Sec. 9 (2)—*Annual value—amount paid by tenant on account of Municipal house tax, if included.*

Annual value in Sec. 9 (2), Income Tax Act means not only annual money

Income Tax Act—(Contd.)

benefit derivable from property but the sum for which the property might reasonably be expected to let from year to year. In estimating the sum for which the property might reasonably be expected to let from year to year, the amount paid by the tenant on account of the Municipal house tax should be included, that is, should be treated as part of the rent payable by the tenant to the landlord. 60 Cal, 357 relied on; 32 P. L. R. 517 overruled. (*Young C. J. & Abdul Raschid JJ.*)

LALLA MAL SANGHAM LAL vs. COMMISSIONER OF INCOME TAX LAHORE.

17 L.h. 494 = 38 P.L.R. 1031 = A.I.R. 1936 L.h. 762 = 164 I.C. 598.

Sec. 10 (2)—Expenditure not falling under Sec. 10 (2), if may be deducted in computing profits of business.

No expenditure which cannot be brought under the clauses of Sec. 10, Sub-sec. (2) Income-tax Act, can be allowed as deduction in computing the profits or gains of a business. (*Derbyshire C. J. Costello. J.*)

LAKSHMI NARAYAN SEN & SONS, LTD. In the matter of.

40 C.W.N. 833.

Sec. 10 (2) (iii)—Money paid by Government to Railway to make up interest on shares guaranteed by Secretary of State, if assessable to tax.

Money paid by Government to a Railway Company under its contract to make up the minimum interest on their shares guaranteed by the Secretary of State for India in Council, is income and comes within the provisions of the Income Tax Act, and is therefore liable to income tax in spite of the fact that it was intended to be paid to the share-holders. (*Derbyshire C. J. & Costello J.*)

AHMEDPUR KATWA RAILWAY CO., LTD. IN THE MATTER OF.

63 Cal. 109 = 40 C.W.N. 642.

Sec. 10 (2) (iii)—Interest on money borrowed, when deductible.

35

Income Tax Act—(Contd.)

When money is borrowed which would probably not have been borrowed had not the assessee's own capital been invested in an income producing business, the interest paid on such borrowing is not deductible under Sec. 10 (2) (iii), Income Tax Act from the income of that business. (*Addison & Abdul Raschid, JJ.*)

H. T. CONVILLE & ANR. vs. COMMISSIONER OF INCOME TAX, PUNJAB.

38 P.L.R. 402 = 161 I.C. 681 = A.I.R. 1936 L.h. 595.

Sec. 10 (2) (vi)—Company succeeding to business of another Company—depreciation allowance, how to be calculated.

A company which succeeds to the business of other companies, is entitled under Sec. 10 (2) (vi), Income-tax Act, to depreciation allowance on the assets taken over from the predecessor company, calculated on the value at which those assets were taken over by the company from the predecessor companies and not upon the original cost of those assets of the predecessor companies. (*Sir Lancelot Sanderson.*)

COMMISSIONER OF INCOME TAX, MADRAS vs. BUCKINGHAM & KARNATIC CO., LTD., MADRAS.

63 I.A. 74 = 59 Mad. 175 = 40 C.W.N. 232 = 62 C.L.J. 409 = 38 Bom.L.R. 133 = 43 M.L.W. 1 = 1936 M.W.N. 1 = 1936 A.L.J. 721 = A.I.R. 1936 P.C. 5.

Sec. 10 (2) (ix)—Allowance paid to Directors of Company for service rendered as provided for in Articles of Association and passed by auditors—Income-tax authorities if entitled to decide if such allowance may properly be deducted.

Whether or not a deduction claimed by the assessee under Sec. 10 (2) (ix) of the Income-tax Act is really expenditure incurred solely for the purpose of earning his profits, must nearly always be a question of fact. Consequently, where in respect of monthly allowances provided for by the Articles of Association of a company

Income Tax Act—(Contd.)

and actually paid to the directors as remuneration for their services, the Commissioner finds that the payments are not bona fide payments for services rendered but a mere device for escaping super tax, and in that view he allows as a deduction only such amount as is found on enquiry to be the market-value of the services rendered by the directors, such decision raises no question of law which may properly be the subject of a reference to the High Court. The passing of such allowances by a competent auditor as reasonable sums paid by way of remuneration does not preclude the Income-tax authorities from examining for themselves what the real situation is and whether the sums are properly deductible for the purposes of the Income-tax Act under Sec. 10 (2) thereof. (*Derbyshire C. J. & Costello J.*)

LAKSHMI NARAYAN SENI & SONS, *In the matter of.*

40 C.W.N. 833.

Sec. 10 (2) (ix)—Money advanced' by assessee's firm to contractor—Contractor agreeing to repay by cheques recoverable from Government—Debt partly paid but debtor subsequently absconding—Nature of the loss.

The assessee firm had advanced large sums of money to a contractor and it was agreed between them that the amount would be repaid by means of cheques received by the contractor from the Government. A small amount only was recoverable and thereafter the contractor absconded without paying any more cheques. There was no evidence on the record to establish that the amount advanced by the assessee was not a loan but capital invested in the absence of the contract. *Held*, that the loss was to be reckoned as a loss pertaining to money lending business of the assessee-firm and not a loss of capital invested in the business of the contractor. After three years from the date of the adjustment of accounts between the parties the debt was to be considered a bad debt and allowance should be made for the debt under Sec. 10

Income Tax Act—(Contd.)

(2) (ix) of Income-Tax Act. (*Addison & Abdul Rashid, JJ.*)

HARNAND RAI—HARBHAGAT RAI *vs.* COMMISSIONER OF INCOME TAX, PUNJAB.

A.I.R. 1936 Lah. 597 = 165 I.C. 367.

Secs. 10 (3) & 13—Personal decree obtained against mortgagor in 1928—appeal from such decree dismissed in 1931—claim by mortgagee for amount due under personal decree to be bad debt—validity.

The assessee obtained a Mortgage deed for Rs. 45,000 in 1921. He instituted a suit in 1921 and obtained a decree in 1925. In execution, the property was sold and a balance of Rs. 26,000 and odd remained due, for which a personal decree was obtained in 1928. The judgment-debtor appealed from the said decree, but the appeal was dismissed in 1931. The decree-holder on being assessed to income-tax in accounting for 1932 & 1933 claimed exemption in respect of the said amount as a bad debt. The Income Tax authorities refused the claim on the ground that it had become a bad debt in 1929. *Held*, that as the appeal was pending and was not dismissed till the end of 1931, the assessee would have been guilty of fraud if he had attempted to claim it as bad debt earlier than the accounting year 1932 & 1933. (*Addison & Abdul Rashid JJ.*)

COMMISSIONER OF INCOME TAX, PUNJAB *vs.* HURUM CHAND GAJADHARMAL.

A.I.R. 1936 Lah. 441 = 163 I.C. 629.

Sec. 13—Method of accounting.

The provisions of Sec. 13, Income Tax Act to the effect that income, profits or gains shall be computed in accordance with the method of accounting regularly employed by the assessee do not imply that the assessee must necessarily adopt the financial year as the accounting period or must adopt a method which would avoid two debts of the 31st March following within one accounting period. (*Addison & Abdul Rashid, JJ.*)

MBLAMAL SHIVDYAL *vs.* COMMISSIONER OF INCOME TAX.

A.I.R. 1936 Lah. 546 = 164 I.C. 316

Income Tax Act—(Contd.)

Sec. 13—Method of accounting not normal—profits may be properly deducted—whether Sec. 13 (proviso), applicable.

It is not necessary that the method of accounting followed should be either purely cash or purely normal. When an assessee follows a method of accounting which though not normal has been regularly followed, and the profit of the business can properly be deducted from the account, the proviso to Sec. 13 has no application at all. (*Macpherson, J.*)

COMMISSIONER OF INCOME TAX vs.
DHAKENWAR PRASAD.

A.I.R. 1936 Pat. 295 = 162 I.C. 995.

Sec. 14 (2) (a)—Exemption contained in the section—applicability of—Dividend paid out of profits of Company part of which was not assessed because exempt and part because not received in British India—dividend paid out of profits not so assessed, if assessable in hands of shareholder.

The exemption contained in Sec. 14 (2) (a), Income Tax Act, applies if the profits or gains of the Company have been assessed to income tax at all, although such profits or gains may include sums either specifically exempt from tax or not chargeable to Indian Income Tax. The exemption is not limited to cases where the whole of the profits of the Company had been assessed to income-tax; or to cases where the dividend in the hands of the assessee was paid or may be taken to have been paid out of such profits of the company as were assessed to Income Tax. Nor is the exemption excluded where the relevant part of the profits of the Company was excluded from assessment not on the ground that it is specifically exempted by the Act but on the ground that it had neither accrued nor had been received in British India. (*Sir George Rankin.*)

COMMISSIONER OF INCOME TAX BENGAL vs. HUNGERFORD INVESTMENT TRUST, LTD

63 I.A. 359 = 40 C.W.N. 1157 = 71 M.L.J. 405 = 1936 A.L.J. 927 = 38 Bom. L.R. 1004 = 1936 A.W.R. 659 = A.I.R. 1936 P.C. 219 = 163 I.C. 430.

Secs. 22 (2), (3) & 29—Return filed after assessment but before service of demand notice if valid.

Income Tax Act—(Contd.)

A return of income furnished after the assessment order is made but before the service of the notice of demand specified by Sec. 29 of the Act, cannot be deemed to have been made within the time allowed by Sec. 22 (3). Such a return is not a valid return under the law. (*Addison & Abdul Rashid, JJ.*)

DHANIRAM DHARAM PAL vs. COMMISSIONER OF INCOME-TAX PUNJAB.

38 P.L.R. 548 = A.I.R. 1936 Lah. 468 = 163 I.C. 857.

Sec. 23 (3)—Enquiries made by income-tax officer without notice to assessee if can form the basis of assessment.

Enquiries made by the Income tax Officer from the people of the District after proceedings under Sec. 23 (3) of the Act have started of which no notice is given to the assessee are illegal and not authorised by the section and the result of such enquiries cannot be taken into consideration in making the assessment. Similarly enquiries made by the Assistant Commissioner during the hearing of the appeal against the assessment behind the back of the appellant should not be made the basis of any assessment. (*Sulaiman, C. J.*)

GOPINATH NAIK vs. COMMISSIONER OF INCOME-TAX.

58 All. 200 = 1935 A.L.J. 1342 = 162 I.C. 103 = 1936 A.W.R. 150 = A.I.R. 1936 All. 286.

Sec. 23 (4)—Effect of a partial default in complying with notice under the section.

A partial default in complying with notice issued under Secs. 22 (4) or 23 (2) involves the same consequences under Sec. 23 (4) of the Act as a total default. (*Addison & Rashid, JJ.*)

BANARSHI DAS vs. COMMISSIONER OF INCOME-TAX, PUNJAB.

38 P.L.R. 812 (2) = A.I.R. 1936 Lah. 499 = 163 I.C. 658.

Sec. 23 (4)—Income-tax Officer if can rely on assessment made during previous

Income Tax Act—(Contd.)

year when assessee fails to produce satisfactory evidence in support of his return.

If the assessee fails to produce satisfactory evidence in support of the return, the Income-tax Officer is entitled to fall back on the assessment of income made during the previous year even though that assessment might have been made under Sec. 23 (4), Income-tax Act to the best of his judgment. (*Sullaiman, C. J.*)

GOPINATH NAIK vs. COMMISSIONER OF INCOME TAX.

58 All. 200=1935 A.L.J. 1342=162 I.C. 103=1936 A.W.R. 130=A.I.R. 1936 All. 256 (S.B.)

Sec. 24 *Ex-partner's share of loss in a trade borne by assessee—Loss, if can be set off under Sec. 24.*

An ex-partner's share of loss in a certain trade which the assessee had to bear by reason of the ex-partner being unable to meet his share of loss in partnership business, cannot be set off against the assessee's other income, profits or gains as a loss of profits and gains within the meaning of Sec. 24 of the Income-tax Act. (*Sir George Rankin.*)

ARUNACHALAM CHETTIAR vs. THE COMMISSIONER OF INCOME TAX, MADRAS

63 I.A. 233=63 C.L.J. 528=40 C.W.N. 705=1936 A.W.R. 479=1936 A.L.J. 644=1936 O.W.N. 404=38 P.L.R. 466=71 M.L.J. 772=1936 M.W.N. 693=44 M.L.W. 8=38 Bom. L.R. 680=A.I.R. 1936 P.C. 133=162 I.C. 1.

Sec. 24—Assessee, trader in salt—securities deposited with Commissioners for postponing payment of wholesale salt purchase—system of securities abolished—assessee called upon to make a cash deposit—sale of securities for less value—claim that loss in sale of securities was loss in business, if maintainable.

The assessee, a general produce dealer purchased salt wholesale from the Government Mines, and deposited securities with the Commissioner of salt for postponing payment. The system of postponing payment being abolished, the assessee sold the securities that was in deposit with the Commissioner of Salt for lesser value and

Income Tax Act—(Contd.)

claimed that his loss in sale of the securities was loss in business. *Held*, the buying of the securities was not compulsory as he could pay cash at once. His loss, in selling the securities was capital item, and he was not entitled to claim exemption on the ground that his loss was in the course of business. (*Addison C. J. & Din Mohammed J.*)

HIRA NAND JAIRAM vs. COMMISSIONERS OF INCOME TAX, RAWALPINDI

A.I.R. 1936 L.A. 452=165 I.C. 671.

Secs. 25A(3) & 26(1)—Registration as firm by Income-tax Officer—Application for renewal of certificate—Income-tax Officer, if can refuse to grant the certificate.

The Income-tax officer is not ordinarily bound by the correctness of any previous orders passed by him but that power is expressly withdrawn by Sub-sec. 3 of Sec. 25 A and r. 6 of the Rules framed by the Board of Inland Revenues under Sec. 59 under which it is imperative on the Income-tax Officer to renew the certificate except when it is proved that the constitution of the firm has altered since the grant of the last certificate. 25 P. L. R. 71 distinguished, (*Suhbhadar & Neogi A. J. C's.*)

COMMISSIONER OF INCOME-TAX, U. P. & C. P. vs. BANGSHI LAL ABIRCHAND.

31 N.L.R. Supp 233=162 I.C. 554=A.I.R. 1936 Nag. 121.

Sec. 26(2)—"Succeeded"—Sense in which the word is used in the section.

The word "succeeded" as used in Sec. 26 (2), Income-tax Act, connotes a transfer of ownership and the person who succeeds another, must have by such succession, become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is. in the capacity of an owner. (*Madhavanniar, C. J. Stone & King, J.J.*)

JUPUDY KESAVA BAO vs. COMMISSIONER OF INCOME-TAX, MADRAS.

43 M.L.W. 155=1935 M.W.N. 1237=70 M.L.J. 13=A.I.R. 1936 Mad. 67.

Income Tax Act—(Contd.)

Sec. 26 (2)—*Firm changing into company on day of assessment—profit, if should be calculated as that of firm.*

A firm with three partners with equal shares was converted into a company in March 1934. There was no substantial change resulting therefrom as no outside shareholder was admitted. The Company thus formed took over the business of the firm as a going concern on the first April 1934. *Held*, that Sec. 26 (2), Income Tax Act obviously meant that the Company which succeeded the firm was liable to pay tax as if it had received the whole of the profits for the previous year when the status was that of a firm. The assessment however being on a Company it would be the rate applicable to the Company that must apply. 52 Bom. 123 relied on. (*Addison & Abdul Rashid JJ.*)

HITKARI BROS. vs. COMMISSIONER OF INCOME TAX.

38 P.L.R. 212 (2)=A.J.R. 1936 Lah. 510=163 I.C. 658.

Secs. 26A & 30 (1)—*Order by Income Tax Officer refusing to register a firm, if appealable.*

Sec. 30, Sub-Sec. (1) of the Income Tax Act was amended in 1933, and the result of the amendment has been to give a right of appeal from an order passed by the Income Tax Officer refusing to register a firm under the provision of Sec. 26 A of the Act. The fact that the section was so amended clearly indicates that prior to the making of such amendment, there was no right of appeal against refusal of an Income Tax Officer to register a firm under Sec. 26A, (*Derbyshire C. J. & Costello J.*)

S. LAL CHAND, IN THE MATTER OF.

63 Cal. 395.

Sec. 27—*Finding as to "sufficient cause" and not "reasonable particular".*

The Income tax Officer has jurisdiction to find as fact whether a particular assessee has failed to establish sufficient cause or not, in reasonable particular within the

Income Tax Act—(Contd.)

meaning of Sec. 27 of the Income-tax, (*Addison & Abdul Rashid, JJ.*)

BANARSHI DAS vs. COMMISSIONER OF INCOME-TAX, PUNJAB.

38 P.L.R. 12 (2)=A.I.R. 1936 Lah. 489=163 I.C. 656.

Sec. 28—*Commissioner hearing appeal against an order imposing penalty if can himself impose the penalty—Necessity of issuing notice.*

The Commissioner of Income tax in hearing an appeal against an order of the Assistant Commissioner imposing a penalty cannot himself reimpose the penalty and therefore validate the very order which was challenged in appeal before him. For the same reason the Commissioner is precluded from imposing the penalty when an application is preferred to him under Sec. 66 (2) of the Act praying that he may refer to the High Court the question of the validity of the imposition of the penalty by the Assistant Commissioner. No penalty can be imposed under Sec. 28 of the Act unless a notice is served on the assessee to show cause against the imposition of such a penalty. (*Addison & Abdul Rashid, JJ.*)

BANARSI DAS vs. COMMISSIONER OF INCOME TAX, PUNJAB.

A.I.R. 1936 Lah. 585=163 A.C. 658=38 P.L.R. 812 (2)

Sec. 28 & 30 (1)—*Assistant Commissioner upholding assessment and refusing to admit appeal, if competent to proceed under Sec. 28 (3).*

Sec. 30, Income-Tax Act deals with appeals against assessments and as soon as the Assistant Commissioner finds that the assessment was validly made under Sec. 23 (4), proviso to Sec. 30 comes into operation. In pursuance of that proviso, the Assistant Commissioner can refuse to admit the appeal. When the Assistant Commissioner has thus refused to admit the appeal he cannot thereafter take any action under Sec. 23 (3) by issuing a notice to the asse-

Income Tax Act—(Contd.)

assesee regarding the penalty. (*Addison & Abdul Rashid, JJ.*)

HANARSHI DAS vs. COMMISSIONER OF INCOME-TAX PUNJAB.

A.I.R. 1936 Lah. 585 = 163 I.C. 638
= 38 P.L.R. 812 (2).

Sec. 30—Order under sections not mentioned in Sec. 30, if appealable.

Sec. 30 provides for appeals against certain specific orders and it necessarily follows that orders passed under sections not mentioned in Sec. 30 are not appealable and are therefore final in the sense that they cannot be reopened at any subsequent stage. (*Addison & Sale, JJ.*)

HAJI ALI JAN vs. COMMISSIONER OF INCOME TAX, PUNJAB.

A.I.R. 1936 Lah. 621 = 164 I.C. 1018

Secs. 30, 31 & 66 (2)—Reference to High Court if must be made whenever assessee requests for the same.

The assessee, who had been assessed by the Income Tax Officer under Sec. 23 (4) of the Income Tax Act, appealed to the Assistant Commissioner of Income Tax who however dismissed the appeal and confirmed the order made by the Income Tax Officer. The assessee thereupon moved the Commissioner of Income Tax to state a case to the High Court. The Commissioner of Income Tax came to the conclusion that all the questions raised in the appeal by the assessee were questions of fact; but nevertheless, he submitted for decision by the High Court the question of law formulated by the assessee, viz., "Whether in the circumstances of the case there were any materials on which the Income Tax Officer could base his finding that the assessee was not prevented by sufficient cause from filing the return called for under Sec. 22(2) or producing the accounts called for under Sec. 22(4). *Held*, that there was no question of law invoked in the case which could be referred for decision by the High Court under Sec. 66 (2) of the Act, and therefore it was not obligatory on the Commissioner of

Income Tax Act—(Contd.)

Income Tax to have formulated the question which he had submitted to the High Court. 9 Rang, 281, explained and distinguished (*Derbyshire C. J. & Costello J.*)

KESHARDEO CHAMARIA, IN RE.

63 Cal. 491.

Secs. 30 & 66—Refusal to register firm—Order, if final.

Under Sec. 30 before its amendment in 1933 it was not open to the Commissioner of Income Tax to refer to the High Court under Sec. 66 of the Act, a question arising out of an order refusing to register a firm under Sec. 26A of the Act, because, such an order was under Sec. 30 as framed before its amendment, not appealable. 58 Cal. 1005, 139 I. C. 497 distinguished, (*Addison & Sale, JJ.*)

HAJI ALI JAN vs. COMMISSIONER OF INCOME TAX, PUNJAB.

A.I.R. 1936 Lah. 621 = 164 I.C. 1018.

Secs. 42 (1) & 43—Company registered outside British India lending money on interest to another company registered in British India—lender company's liability to assessment.

Where certain companies are closely associated and one of the companies registered outside British India lends money at interest to another of the companies registered in British India, the former company is in receipt of profit or gains taxable under Secs. 42 (1) & 43, Income Tax Act. (*Sir George Rankin.*)

COMMISSIONER OF INCOME TAX, BOMBAY vs. BOMBAY TRUST CORPORATION.

63 I.A. 408 = 1936 A.W.R. 843 = 1936 A.L.J. 1204 = 64 C.L.J. 194 = 41 C.W. N. 33 = A.I.R. 1935 P.C. 269 = 164 I.C. 18.

Sec. 46—Proceedings under Sec. 46 for non-payment of tax—assessee arrested by Revenue officer—Application to High Court for writ of certiorari, if maintainable.

Income Tax Act—(Contd.)

The petitioner was assessed to payment of income tax, and proceedings under Sec 46 of the Income Tax Act were commenced and certificates were issued. The tax not being realised, the Revenue officer issued an order for the arrest of the petitioner, whereupon he applied to the High Court for a writ of certiorari, to quash the proceedings for arrest of the petitioner. The Government took a preliminary objection that the High Court had no jurisdiction to issue the writ of certiorari under Sec. 106 (2) of the Government of India Act.

Held, that income tax being revenue, the High Court's jurisdiction to issue a writ of certiorari was barred. 4 M. I. A. 353, relied on. 45 M. L. J. 592 referred. (*Venkata ramana Rao J.*)

THYAGARAJA CHETTIAR vs. COLLECTOR OF MADURA.

59 Mad. 702=70 M.L.J. 343=1936 M.W.N. 53=43 M.L.W. 396=163 I.C. 60=A.I.R. 1936 Mad. 395.

Secs 48, 50 & 66 (2) & (3)—Assessee declared non-assessable to income tax on account of losses—application by assessee for refund of tax deducted at source—application time barred—extension of time, if may be granted.

The income of an assessee was declared non-assessable to income tax on account of losses sustained in business. The assessee thereupon applied for refund of a sum deducted at source on account of income tax. That application having been barred the assessee applied for an extension of time, which was rejected by the Commissioner. The assessee then applied for an order directing the Commissioner of Income Tax to state a case under Sec. 66 (3) of the Act. *Held*, that the Commissioner had rightly decided that he had no power to extend the time for the application for refund of income tax under Sec. 50 of the Income Tax Act. *Held*, further that Sec 66 (3) of the Income Tax Act was controlled by Sec. 66 (2) of the Act, and under that sub-section an assessee was not entitled to require the Commissioner to state a question of law

Income Tax Act—(Contd.)

arising out of an order under Sec. 48. (Page C. J. & Ba U J.)

ADAMJEE HAJEE DAWOOD & CO., LTD. vs. COMMISSIONER OF INCOME-TAX, BURMA.

13 Rang. 729=161 I.C. 976=A.I.R. 1936 Rang. 85

Sec 66—Question of possibility of deducting income, profits and gains from method of accounting employed by assessee—Decision of Income Tax officer, if can be challenged by application under Sec. 66.

The Income Tax Officer is the sole arbitrator on the question of the possibility of deducting the income, profits and gains of the assessee from the method of accounting employed by him. The correctness of the opinion of the officer in these circumstances is a question of fact which cannot be challenged by means of application under Sec. 66 of the Act. (*Addison & Sale, J.J.*)

Haji Ali Jan vs. Commissioner of Income Tax Punjab.

A.I.R. 1936 Lah. 621=164 I.C. 1010.

INCOME TAX RULES.

Rule 35—Income tax Officer requiring an insurance Company to furnish valuation report, to arrive at its profits—Company declining to give this—Action under r. 35, if justified.

Where the Income-tax Officer is of opinion that in case of a Life Insurance Company, the only reliable data to arrive at its profits is by a valuation report and he asks for such valuation report from the company but the Company declines to give this, the Income-Tax Officer is justified in resorting to rule 35. (*Lord Thankerton.*)

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. vs. COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY.

60 Bom. 248=1936 A.W.R. 49=A.I.R. 1936 P.C. 55=160 I.C. 1=40 C.W.N. 965=1939 M.W.N. 226=63 C.L.J. 412=1936 O.W.N. 84=38 Bom. L.R. 361=70 M.L.J. 412.

INJUNCTION.

Suit for injunction for removal of obstruction in public street—Fact that must be proved.

Injunction—(Contd.)

In a suit for declaration that a particular street is a public street and for an injunction on the defendant restraining him from obstructing the street, the plaintiff must establish that he is entitled to use the public highway which has been obstructed by the defendant and that he has been inconvenienced by the obstruction. It is not necessary for him to prove that he has been inconvenienced in excess of any other member of the public who may have the right to use the public highway or that he has suffered some special damage of a kind not common to the public.

GHULAM BASUL KHAN vs ALI BOKSH

A.I.R. 1936 Lah 132 = 161 I.C. 457.

Order restraining permanent installation of an image in a temple if forbids even temporary installations.

An injunction must be strictly construed. Therefore a perpetual injunction that "no adorned image should ever be permanently installed within the temple" cannot be construed as an order restraining the persons enjoined from temporarily installing the image on any day in the year but one or two. (Sir John Wallis.)

DEANULAL SUCHANTI vs. SETH HUKUM CHAND.

40 C.W.N. 293 = 17 Pat. L.T. 69 = 38 Bom. L.R. 336.

Application for preventing order of a judicial commission taking effect during pendency of appeal—Injunction, if may be granted.

Where an application was made for the issue of an order preventing the order passed by a judicial commission from taking effect before the disposal of the appeal preferred from such order, no equitable relief by way of injunction can be granted to the applicant where he does not come to Court with clean hands. (Agha Haider, J.)

JESWANT SINGH vs. SHIROMONI GURUDWARA PRABANDHA COMMITTEE.

* A.I.R. 1936 Lah. 567 = 164 I.C. 16.

INSOLVENCY.

Act of Insolvency—Transfer of a part of assets if constitutes act of insolvency when the remainder is sufficient to meet the other debts of the debtor.

When a debtor transfers a part of his assets to satisfy pre-existing debts, it cannot be said of the transfer that it was made with intent to defeat or delay creditors and thereby constituted an act of insolvency, when it appears that there is still left after the transfer sufficient assets in the hands of the debtor to enable him to meet his other engagements. (Ba U & Mackney J.)

P. M. CHETTIAR FIRM vs. A. K. A. C. T. A. L. CHETTIAR FIRM.

A.I.R. 1936 Rang. 129.

Fraudulent preference—Facts that should be considered.

In dealing with the question as to whether with a view to give fraudulent preference to the transferee over other creditors, what is always to be borne in mind is what the dominant motive of the debtor is in making the transfer or payment in question. If his dominant motive is either to save himself from exposure of criminal prosecution or to secure some particular advantage for himself such as to enable himself to carry on his business, and the transfer is made as a result of pressure brought by the transferees for payment of their dues, the transfer or payment cannot be said to amount to fraudulent preference, 11 Rang. 489 followed. (Ba U & Mackney, JJ.)

P. M. CHETTIAR FIRM vs. A. K. A. C. T. A. L. CHETTIAR FIRM.

A.I.R. 1936 Rang 129.

Creditor, party to a deed of assignment to creditors, if can rely on execution of such deed, as an act of insolvency.

A creditor who is party to or privy to a deed of assignment to creditors cannot rely upon the execution of that deed, as an act

Insolvency—(Contd.)

of bankruptcy although he may rely on an independent act of bankruptcy. (*Mockett, J.*)

J. MO. IVOR vs. ALAGAPPA CHETTIAR.
70 M.L.J. 545=43 M.L.W. 280=162
I.C. 722=A.I.R. 1936 Mad. 27

Suit for partition by sons of insolvent from after the property has vested in the Official Receiver—Official Receiver not contesting suit and suit decreed—application by Official Receiver to set aside ex parte decree dismissed—suit by creditors to avoid decree, if maintainable.

The minor sons of an insolvent after the property has vested in the Official Receiver, filed a suit claiming partition of the family property. The Official Receiver who was impleaded as a defendant in that suit did not appear at the hearing, and the suit was decreed. An application by the Official Receiver to have the ex parte decree set aside was also dismissed. Thereupon the creditors filed a suit to have the decree in the partition suit declared null and void on the ground that it was the result of gross neglect on the part of the Official Receiver. *Held*, that the suit was not barred by reason of the fact that the creditors had another remedy by way of an application under Sec. 66, Provincial Insolvency Act. (*Burn & Menon JJ.*)

PAPPANAICKENPALAYAMPUDUR RAMA
VILAS NIDHI, LTD., vs. PERA
NAICKEN.

59 Mad. 770=70 M.L.J. 90=1936 M.
W.N. 79=43 M.L.W. 488=169 I.C.
723=A.I.R. 1936 Mad. 161.

Official Receiver selling son's share on father's insolvency by mistake—previous attachment of son's share in execution of a decree—decree-holder, if entitled to claim sale proceeds in the hands of the son.

Certain land belonging to father and son in a joint Hindu family were attached in execution of a decree. Subsequent to the attachment the father was adjudicated insolvent and the Official Receiver in whom the father's share vested sold not only his

Insolvency—(Contd.)

interest in the land, but also that of the son. The decree-holder thereupon sought in execution by way of a prohibitory order, to attach the money in the Receiver's hand, representing the sale proceeds of the son's shares in the property. *Held*, that the fact that the Official Receiver wrongfully sold the son's share could not deprive the decree-holder of his right, and he was entitled to recover the amount representing the sale proceeds of the son's share from the Official Receiver. 49 Mad, 849 followed. (*Venkatasubba Rao J.*)

PARAMESWARAMA vs. VENKATARAMA-
YYA.

71 M.L.J. 294=1936 M.W.N. 769=44
M.L.W. 201=164 I.C. 853=A.I.R. 1936
Mad. 698.

Coparceners in joint family, if liable to be adjudicated insolvents for debts incurred by manager.

The act of insolvency to serve as the basis of an adjudication upon a creditor's petition must be an act committed by his debtor and unless there is a personal liability in respect of a debt, there is no such relation of debtor as will serve to support an adjudication order. Unless therefore there is a personal liability on the coparceners of a joint Hindu family for the debts incurred in the family business the coparceners are not liable to be adjudicated insolvents. (*Cornish J.*)

KRISHNA AYYAR vs. PIERCE LESLIE.

1936 M.W.N. 539=43 M.L.W. 587=
160 I.C. 478=A.I.R. 1936 Mad. 64.

Partnership agreement by insolvent in the name of his son, if valid.

Where an insolvent enters into a partnership business, but to avoid the legal prohibition to carry on any business in his own name, he names his minor son ostensibly as a partner, the agreement being obviously intended to defeat the provisions

Insolvency—(Contd.)

of the insolvency law, is absolutely void.
(*Bhude J.*)

NARINJAN SINGH vs. DAMODAR SINGH.

A.I.R. 1936 Lah. 831.

Sole proprietor of firm selling business to another firm, and assuming to himself the position of a creditor—other creditors if may object to his being a creditor.

The sole proprietor of a firm transferred the business to another firm, and entries were made in the books to the effect that the transferor had become a creditor of the firm to the extent of the amount covered by the value of the goods and the value of the debts. Certain creditors having applied to have the new firm adjudged insolvent, the transferor claimed to be a creditor of the firm. The claim was resisted by the other creditors on the ground that the so called transferor was really the proprietor of the firm and the transfer was a fictitious transaction intended to defraud the creditors. *Held*, that the sale of the firm was bonafide, and the transferor was entitled to stand in the position of a creditor of the firm. (*Addision Abdul & Rashid J.*)

SARAB KRISHNA SHADI RAM BADRI DAS.

35 P.L.R. 627 = 162 I.C. 618 = A.I.R. 1936 Lah. 760

Adjudication under Punjab Laws Act—discharge not obtained—fresh application, if barred.

An application for adjudication under the Provincial Insolvency Act was dismissed on the ground that prior to the passing of the Provincial Insolvency Act of 1907, The applicant was made an insolvent under the Punjab Laws Act, and had not at the time of his application for adjudication obtained an order of discharge in respect of that insolvency.

Held, that there is nothing either in the Provincial Insolvency Act or any other provisions of law which debars either a creditor or a debtor from proceeding by fresh application under the Provincial Insolvency Act, even where the debtor has

Insolvency—(Contd.)

been made an insolvent under the Punjab Laws Act and obtained an order of discharge. (*Jai Lal J.*)

TULSI RAM vs. FIEMING SHAW & CO.,
AMRITSAAR.

A.I.R. 1936 Lah. 407 = 164 I.C. 846.

INSURANCE.

"Administrators"—meaning of the term as used in policies of insurance.

The word "administration" in policies of insurance cannot be read so as to include those who are relieved of the necessity of taking out letters of administration by reason of the provisions of Sec. 212 (2) of the Succession Act. (*Panckridge J.*)

ASHUTOSH GHOSH vs. PROTAP CH. BANERJI & ORS.

40 C.W.N. 1247.

"Assign"—Meaning of the expression as used in policies of insurance.

The word "assign" in policies of insurance means a person to whom the assured has assigned the benefit of the policies and a consent decree obtained against the heirs of the assured cannot be read as such an assignment. (*Panckridge J.*)

ASHUTOSH GHOSH vs. PROTAP CH. BANERJI & ORS.

40 C.W.N. 1267.

False information regarding family history, given in proposal if invalidates policy.

Where some of the answers given by the assured in his proposal and declaration forming the basis of a contract of insurance are untrue, the policy is void irrespective of the questions of its materiality. Where therefore the assured when required to give the total number of his brothers and sisters and as to how many of them were living, mentioned only the actual number alive on the date of his proposal and left blank the other two columns without mentioning how many had died and particulars of date, *held*, that the answers, to the questions which formed the basis of the contract were false

Insurance—(Cont.)

and the policy was therefore void. (*Nasim Ali J.*)

**LIGHT OF ASIA INSURANCE CO., LTD.,
vs. KARATAYA DEBI.**

**40 C.W.N. 1016=A.I.R. 1936 Cal.
437.**

Policy containing stipulation that declaration and answers to question shall form basis of contract—untrue statements in answers if avoid policy.

Where a policy of insurance provides that "the proposal of insurance and declarations and answers to questions mentioned in the schedule shall be held form the basis of the contract" untrue statements in the answer avoid the policy irrespective of their materiality. Accordingly, where a column in the questions requires the insured to state the total number of his brothers and sisters and there are separate columns for the numbers of the living and the dead mention by the insured of the living only avoids the policy. (*Nasim Ali J.*)

**LIGHT OF ASIA INSURANCE CO., LTD.,
vs. KARATAYA DEBI.**

**40 C.W.N. 1016=A.I.R. 1936 Cal.
437.**

Joint insurance—fraud of one the persons insuring if affects the others.

In the case of a joint insurance the fraudulent claim of one of the joint insureds would equally hit the claim of the other insureds, though the insurable interest was different. Where, therefore two persons jointly insured certain premises against loss by fire with an Insurance Company, and one of the persons made a grossly exaggerated and fraudulent claim in respect of damage caused to the insured premises by fire, held, that the claim on the insurance failed in toto (*Dalip Singh & Agha Haidar JJ.*)

GUARDIAN ASSURANCE Co., vs. J. RUSTOMJEE & Co.

162 I.C. 443.

Alteration of the rules of an Insurance Company—policy-holder, whose policy effec-

Insurance—(Contd.)

ted before the said alteration, if can claim benefit of the altered rules.

The rules of an Insurance Company provided that if the assured committed suicide, his heirs or assignees would only be entitled to refund of the premia actually paid. A contract of assurance was made while this rule was in force. Subsequently the above rule was altered and provision was made for the payment of the policy amount in full, in case the assured committed suicide more than two years after the policy had been effected. A person who had insured with the Company while the previous rule was in force, committed suicide more than two years after the policy had been in force, and after the alteration mentioned above had been made. The heirs of the assured claimed the full amount of the policy and the question therefore arose which of the two rules governed the case. It was found that a footnote in the policy contained the following words. "This policy is granted subject to the rules and regulations for the time being in force, etc."

Held, that the words "for the time being in force" meant the rules in force at the time when the policy matured, and therefore, the heirs of the assured were entitled to the full amount of the policy. (*Tekchand & Jasal JJ.*)

**CO-OPERATIVE ASSURANCE CO. LTD.
vs. L. SAHDEV. & ANR.**

**35 P.L.R. 404=162 I.C. 150=A.I.R.
1936 Lah. 655.**

Life Insurance policy payable to "assured, his executors administrators or assigns"—in testacy of the assured—right of a person to claim under the policy without taking out letters of administration.

Although, under Sec. 212 (2) of the Indian Succession Act, the grant of letters of administration is not essential in the case of a Hindu intestacy, still where an Insurance Company stipulates that the money due under a policy will only be paid to the "assured or his executors, administrators or assigns," the right of persons entitled to claim the policy money, in the

Insurance—(Contd.)

absence of such grant, cannot be recognised, 51 All. 1026 relied on. (*Panckridge J.*)

ASHUTOSH GHOSH vs. PROTAP CH. BANERJI & ORS

40 C.W.N. 1247.

Motor insurance policy—Exceptions in the policy—onus of proving that case is covered by exception on whom lies.

A policy of motor insurance provided for the payment of compensation by the Insurance Company to the insured or his legal representative in case of any injury being sustained by the insured in connection with any motor vehicle described in the policy. An exception to the policy provided that no liability was to be attached to the Company in respect of any personal accident to the insured occurring while the motor vehicle was being driven in a damaged or unsafe condition. In a suit to recover compensation on the basis of the said policy, held, that the onus lay on the insurance Company to show that the case fell within the exception to the policy of insurance issued by them. But it was enough for the Company to show that the car was driven in a damaged or unsafe condition, and it was not necessary to prove further that the driver had knowledge of the defect, (*Lord Alnes.*)

TRICKE'TT vs. QUEENSLAND INSURANCE CO. LTD.

43 M.L.W. 276 = 1936 N.W.N. 497 =
70 M.L.J. 437 = A.I.R. 1936 P.C. 74 =
160 I.C. 544

Commission to agents payable on receipt of payment by customers—Such commission, if may be claimed when agency otherwise terminated.

The plaintiff, an insurance agent was entitled to renewal commission on cases introduced by him, on payment by the customers. The question arose when his agency was terminated and as to whether he would be entitled to renewal commission in future. Held, that the duties of the agent did not cease with the first introduction of the customer to the company and

Insurance—(Contd.)

commission could not be claimed by the agent on payments made by customers after the termination of his agency, (*S. K. Ghosh & Edgely JJ.*)

PROVAT KAMAL BASU vs. PHOENIX INSURANCE CO. LTD.

40 C.W.N. 694 = A.I.R. 1936 Cal. 216 =
162 I.C. 525.

INTEREST.

Discretion of Court to grant interest—Suit for account of monies—Power of Court to grant interest before date of suit.

In the matter of granting interest, Courts are entitled to use their discretion, and in a suit for accounts of money received by the defendant, the Court can grant interest before the date of the suit but where interest before decree is not claimed under the account nor granted by the Court in the preliminary decree, the plaintiff cannot claim to get such interest in working out the final decree. (*Banguley & Mackney, JJ.*)

MUTHU KARUPPAN CHETTIAR & ANR. vs. ANNAMALI CHETTIAR.

A.I.R. 1936 Rang. [1:1] = 163 I.C. 352.

INTERPRETATION OF STATUTES.

Intention of legislature—Language if may be strained to gather the intention.

In construing an Act of Parliament the Court always has to ascertain the intention of the Legislature from the language of the whole enactment, and it sometimes becomes necessary to do a certain amount of violence to the language in which a particular passage is concluded in order to give effect to the intention to be gathered from the enactment as a whole. (*Beaumont C. J., N. J. Wadia & Divatia JJ.*)

VAIJAPPA SHIVALUNGAPPA HUMBERWADI vs. EMPEROR.

60 Bom. 55.

Intention of Legislature.

It is very dangerous for Courts to try and find out the intention of the legislature

Interpretation of Statutes—(Contd.)

then strain the language used in the statute to carry out the intention. If the legislature has failed to express its intention in the statutes that will have to be remedied by legislative actions. (*Baguley & Mackney JJ.*)

MANNU ALLI vs. HAWABI.

A.I.R. 1936 Rang. 63=162 I.C. 632.

Court if can enquire into the intention of the legislature in framing a statute.

The primary rule of interpretation of Statutes is to be gathered from the language used in the statutes. Where the words used in the statutes are unambiguous, it is not open to the Court to enter into speculation as to what the real intention of the legislature was. (*Jai Lal J.*)

ISHAR SING vs. ALLAH RAKHA.

35 P.L.R. 906=165 I.C. 658=A.I.R. 1936 Lah 693.

Court, if can enquire into the intention of the legislature in applying the provisions of an Act.

It is not for the Court to try to discover what the intention of the legislature was when the Act in question was passed. Courts have only to deal with the clear language of the Act as passed and endeavour to interpret it. The business of the interpreter is not to improve the statute but to expound it. The question for him is not what the legislature meant, but what it language means, that is, what the Act has said that is meant. (*Bhide & Currie JJ.*)

COMMITTEE OF MANAGEMENT FOR GURDWARA NANKANA SAHIB vs. HIRA DAS.

A.I.R. 1936 Lah. 298=165 I.C. 846.

Intention of legislature, if can be gathered from subsequent enactment.

Expressions used by the Legislature in subsequent enactments or amendments may on occasions be used for the purpose

Interpretation of Statutes—(Contd.)

of interpreting earlier enactments. (*Guhu & Bartley JJ.*)

PURNA CHANDRA CROWDHURY vs. ALEP BISWAS.

40 C.W.N. 548=62 C.I.J. 538=A.I.R. 1936 Cal. 64=161 I.C. 183.

Words of statute having different meanings—interpretation to be put upon them by the Courts.

The Courts are bound to give effect to the intention of the legislature and are bound therefore by the express words of the legislature, when those words can have but one meaning. Where, however, it is possible to construe the words of the legislature in more than one way, the Courts will always lean against an interpretation which will give retrospective effect to the terms of an enactment. (*Barlu & Sen JJ.*)

SHANTINIKETAN CO-OPERATIVE HOUSING SOCIETIES, LTD. ANR. & vs. MADHAV LAL AMIR CHAND & ORS.

60 Bom. 125=A.I.R. 1936 Bom. 37.

Words used in a statute, if may be treated as superfluous.

It is a cardinal rule for the interpretation of statutes that if the words used can be given a meaning they must be given that meaning and not be regarded as purely superfluous verbiage. (*Roberts O. J. & Baguley J.*)

BANK OF CHETTINAD, LTD., vs. KO TIN.

14 Rang. 494=A.I.R. 1936 Rang. 393=163 I.C. 645.

Interpretation that should be adopted when two interpretations of a section possible,

Where two interpretations of a section are possible the Court should be guided by the general principle that that interpretation should prevail which is most consistent with reason, common sense and convenience.

Interpretation of Statutes—(Contd.)

(*Thom, Niamatullah & Bachhapal Singh JJ.*)

MAIROO LAL vs. SANTOO.

1936 A.L.J. 782=1936 A.W.R. 563
=A.I.R. 1936 All. 576=164 I.C. 298.

Restrictive legislation—principles of construction.

It is true that restrictive legislation has to be strictly construed, but that does not mean that the language has to be strained in order to do so. Every clause of a statute should be construed with reference to the context and the other clauses of the Act so far as possible, to make a consistent enactment of the whole statute, and the true meaning of any passage is that which being permissible best harmonises with the subject and with every other passage of the statute. (*Addision & Abdul Raschid JJ.*)

DEPUTY COMMISSIONER MUZAFFARGARH vs. JOINT HINDU FAMILY OF TAH-LIA RAM.

17 Lah. 531=36 P.L.R. 957=163 I.C. 947. = A.I.R. 1936 Lah 545.

Illustrations—value of.

Illustrations appended to a section are to be taken as a part of the statute. (*Srinivasan A. C. J., Zia ul-Hassan J.*)

SRI NATH vs. KEDAR NATH PURI.

1936 O.W.N. 565=162 I.C. 1025.

Retrospective operation when should be given to statute.

It is a cardinal rule of legal interpretation that statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject matter or context shows that such was their object. (*Baguley & Sen JJ.*)

BANK OF CHETTIAND, LTD vs. MA BA LO.

14 Rang. 494=A.I.R. 1936 Rang. 152
=163 I.C. 645.

Interpretation of Statutes—(Contd.)**Retrospective effect on pending cases.**

Where a Statute provided that certain circumstances affecting vested rights shall be deemed to have existed in respect of transactions prior to a certain date, held, that the provision applied to all transactions of the kind specified including those which were in question in a pending suit at the date the provision came into force, (*Sir George Rankin.*)

K. C. MUKHERJEE vs. MIST. RAMRATAN KUAR.

40 C.W.N. 263=62 C.L.J. 419.

Statute taking away or imposing vested rights under existing law, if can have retrospective effect.

Every statute which takes away or imposes vested rights acquired under existing law, creates new obligations or imposes new duties or attaches new disabilities, must be presumed out of respect for legislation not to have retrospective operation. (*Gutho & Bartley, JJ.*)

SRIPATI CH. DEY vs. KAILAS.

40 C.W.N. 984=A.I.R. 1936 Cal. 386.

JUDICIAL OFFICERS PROTECTION ACT (XVIII OF 1850.)**Application of the Act to president of Union Bench,**

A president of a Union Bench is entitled to protection under the Judicial Officer's Protection Act in respect of observations made in a report which has been called for from him on an application being made for the transfer of a case from the Bench. (*M. C. Ghosh J.*)

HEM CHANDRA ROY CHAUDHURY vs. TARAPADA SANYAL.

40 C.W.N. 500.

JURISDICTION.**Jurisdiction of Court when complete.**

The jurisdiction of a tribunal is complete when a case falls within its pecuniary

Jurisdiction—(Contd.)

and territorial jurisdiction and the tribunal has got jurisdiction over the subject matter, and the parties to the proceeding. (*Macpherson & Khaja Mohammed Noor JJ.*)

JAGISH CH. DEO DHABAL DEB
vs. SANKARSHAN BHUMJI.

15 Pat. 483=17 P.L.T. 443=162 I.C.
582.

Objection, if may be taken in appeal or revision.

An objection that the Court had no jurisdiction to execute a particular decree or to entertain a particular appeal cannot be raised for the first time in appeal or revision, even in respect of a suit in accordance with Sec. 11, Suits Valuation Act. (*Bhide J.*)

ABDUL AZIZ vs. ANJUMAN IMDAD BAHMI KARZA.

38 P.L.R. 698=A.I.R. 1936 Lah. 442=
163 I.C. 278.

Interference by Civil Court with discretion exercised by a Revenue Court.

The Civil Court should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court under powers conferred by the Estates Partition Act. When such interference is invoked, the facts must be scrutinised with particular care. (*Dhale & Agarwalla JJ.*)

GOPALJI JHA vs. GAJENDRA NARAYAN SINGH.

15 Pat. 404=17 P.L.T. 109=162 I.C.
210=A.I.R. 1936 226.

"Trial of suit," meaning of—Expression if limited to hearing, or covers taking cognisance.

The "trial" of a suit includes the jurisdiction to take cognisance of it. When a provision is made that the trial of suits in a certain district is to be governed by the C. P. Code, such provision includes all essential matters, covering the hearing of a case including the competence of the Court to entertain it and therefore the Court sup-

Jurisdiction—(Contd.)

lies not only the procedural rules but also the rules of jurisdiction. (*Sir Shadi Lal.*)

NRISINGHA CHARAN NANDY CHOUDHURY vs. RAJANITI PRASAD SINGH & ORS.

63 I.A. 311=15 Pat. 567=40 C.W.N.
1061=17 P.L.T. 461=71 M.L.J. 60=
163 I.C. 49=38 Bom. L.R 768=63
C.L.J. 476=A.I.R. 1936 P.C. 189.

Plea that a suit is not maintainable if can be raised by defendant after filing his statement

A question which goes to the root of a suit can be raised at any stage of the suit and is a question of which the Court must take cognisance when brought to its notice. In a suit brought by a partnership firm, it is open to the defendant, even after he has filed his written statement to take the plea that the suit is not maintainable, as the partnership firm had not been registered under Sec. 58 of the Partnership Act. (*Mc. Nair, J.*)

GOPINATH MOTILAL vs. RAMDAS.

A.I.R. 1936 Cal. 133=161 I.C. 741.

Suit valued at over Rs. 5,000—interlocutory order by Sub-Judge awarding certain costs—jurisdiction of Munsiff to execute the order.

An interlocutory order for certain costs was passed by a Sub-Judge hearing a suit valued at over Rs. 5000. The said order or decree was sent to the Munsiff for execution and was duly executed by him. In second appeal, it was urged that the Munsiff had no power to execute the decree. Held, that the execution was invalid, as the Munsiff had no jurisdiction to execute the decree, and as it was a case of inherent want of jurisdiction and not of irregularity, the defect could not be cured by waiver. (*Khaja Mohammed Noor & Varma JJ.*)

MST. ANCHARI vs. BRIJMOHAN LALL MADAN LALL.

17 P.L.T. 160=181 I.C. 700=A.I.R.
1936 Pat 177.

Objection as to valuation by defendants—Submission by plaintiff—decision, if binding,

Jurisdiction—(Contd.)

When a Court allows an objection by the defendant to the valuation of a suit given by the plaintiff, who submits to the Court's orders, the question of jurisdiction must be held to have been finally decided between the parties and it cannot be re-agitated subsequently. (*King C. J. & Zia-Ul-Husan J.*)

PRATAP BAHADUR SINGH vs. BARKHANDI MAHESH PRATAP NARAIN SINGH.

1936 O.W.N. 132=160 I.C. 461-A.
I.R. 1936 Oudh 222,

Power of Court to assess fair rent in cases not covered by statute.

Under the general law, no Court has jurisdiction to make a contract between the parties. An assessment of fair rent is tantamount to making a contract between the parties and any Court attempting to exercise, such power would be acting without jurisdiction. (*Wort J.*)

JAINARAIN LAL & ORS. KASHILAL & ANR.

17 P.L.T. 715.

Suit for declaration that assessment of town tax by a Panchayat is illegal—jurisdiction of civil court to entertain.

Suits are of a civil nature if they are ~~spite~~ between subject and subject dealing with civil right. A suit for a declaration that the assessment of town tax by a Panchayat is illegal and ultra vires is not between subject and subject, but between a subject and branch of a Local Self Government, and it does not deal with civil right, but it deals with a question of taxation, and as such is not a suit of a civil nature, and civil courts have jurisdiction in a suit of that nature. 27 Cal. 849 distinguished (*Suaiman C. J. & Bennet J.*)

SHEO NARAIN vs. TOWN AREA PANCHAYAT. CHHIBRAMAN.

1936 A.W.R. 107=1936 A.I.J. 33=
A.I.R. 1936 All. 117=159 I.C. 897.

Civil Court if can declare an arbitrary Municipal assessment to be ultravires,

Jurisdiction—(Contd.)

An arbitrary Municipal assessment can be challenged in a Civil Court and if the fact of its being arbitrary is established, the Court can declare such an assessment to be ultravires. (*R. C. Mitter J.*)

MUNICIPAL BOARD OF TEZPUR vs. ABDUL HAMID.

40 C.W.N. 33.

Settlement of date and palm trees for season—Suit for money due on the settlement—Court in which such suit should be brought.

Money payable under settlement of date and palm trees for a season, for the purpose of taking juice from the trees, is not rent, and a suit to realise such money is a suit of a Small Cause Court nature and should be brought in the Small Cause Court. (*Agarwalla & Rowland JJ.*)

KAMESHWAR SINGH vs. MAHARIR PARSHI.

15 Pat 528=17 P.L.T. 363=A.I.R.
1936 Pat. 403.

Power of Revenue Court to try question of proprietary title when plaintiff recorded as having proprietary title.

When the plaintiff is recorded as having proprietary title entitling him to institute a suit, it is not open to the Revenue Court to go behind the decree and receive evidence and itself try the question of proprietary title. (*Nanavutty J.*)

SALIK RAM vs. BHUDAR SINGH.

1936 O.W.N. 93=159 I.C. 1017

A suit for partition—Preliminary decree passed and appeal filed therefrom—power of trial court thereafter to entertain compromise petition during pendency of appeal.

Where in a suit for partition a preliminary decree was passed, the fact that an appeal had been preferred from that decree did not necessarily oust the jurisdiction of the trial court to entertain a petition of compromise and an application for leave to

Jurisdiction—(Contd.)

compromise. Because, a suit for partition in which a preliminary decree had been passed must be deemed to be pending until the final decree is passed and the jurisdiction of the trial court is not ousted by reason of the pendency of an appeal from the preliminary decree. 53 Mad. 378, followed (*King C. J. & Nanavutty, J.*)

LALTA PRASAD vs. KEDAR NATH.
1936 O.W.N. 542 = 183 I.C. 202 = A.I.R. 1936 Oudh 320.

Suit for declaring a certain revenue sale illegal—no consequential relief prayed for—question of court-fee taken up as preliminary issue and decided—Jurisdiction of District judge to hear appeal from the said order.

A suit was brought for a declaration that a certain revenue sale was illegal and ultravires. No consequential relief was prayed as no possession had been delivered when the suit was brought. A court-fee of Rs. 20 was paid on the plaint. The trial Court took up the question of court-fee as a preliminary issue and decided that the amount of court-fee paid was sufficient. Against that order an appeal was taken by the defendants to the District Judge. *Held*, that the District Judge had no jurisdiction to hear the appeal. 23 Bom. 486 16 C. L. J. 375 and 28 C. W. N. 683 distinguished. (*S. K. Ghosh & Edgely JJ.*)

RASH BEHARI NANDI vs. HAFIZA KHATUN CHOWDHURANI.

63 C.L.J. 16 = A.I.R. 1936 Cal. 784.

Suit for restitution of conjugal rights—Cause of action where arises.

The Court in whose jurisdiction the husband lives will have jurisdiction to try a suit for restitution of conjugal rights, because, the cause of action in such a suit arises where the husband lives and where the wife refuses to live, 18 Bom. 316 & 10 Bom. 401 applied. (*Beasley C. J. & Stodart J.*)

VENUGOPAL NAIDU vs. LAKSHI AMMAL,

59 Mad. 392 = 1936 M.W.N. 19 = 70 M.L.J. 288 = A.I.R. 1936 Mad. 288 = 161 I.C. 485.

Jurisdiction—(Contd.)

Suit decreed ex parte against defendant by foreign Court—Previous suits by defendants as plaintiffs in foreign Court—Submission by defendant to jurisdiction—Effect of.

The plaintiff obtained in the Cochin Court an ex parte decree against the defendants who were residing in British India at the time of the suit. In execution proceedings objection was taken to the jurisdiction of the Cochin Court to pass a decree but the decree-holder contended that the defendants had submitted to the jurisdiction of the Cochin Court by reason of the fact that they had in previous cases figured as plaintiffs in the Cochin Court and that during the pendency of the present suit they had written a letter to the plaintiff requesting for certain concessions. *Held*, (1) that the earlier suits in which the defendants had been in the position of the plaintiffs had no bearing upon this question and (2) that so far as the letter asking for concessions was concerned it was certainly to be taken into account as evidence bearing upon the intention of the defendants to remain ex parte and not to contest the plaintiff's claim acknowledging the same to be a just one. (*Beasley, C. J.*)

OOMER HAJEE AYOUB SAIT vs. THIRUNAVUKKARASU PANDARAM.

53 Mad. 918 = 71 M.L.J. 93 = 162 I.C. 804 = 1936 M.W.N. 478 = 43 M.L.W. 607 = A.I.R. 1936 Mad. 552.

LAHORE HIGH COURT RULES.

Vol. I, Chap. 12L para. 20—
Commission paid to auctioneer for execution sale if must be refunded on sale being set aside.

Under the rules as framed in para 20, of Chap. 12L of the Rules and Orders of the Lahore High Court, Vol. I, when an auction sale is set aside whether under the provisions of the C. P. Code, or under any compromise between the parties, or otherwise, the auctioneer is bound to return his commission. The rule is no doubt hard but it is very clear and must be followed. (*Agha Haidar J.*)

KALYAN SINGH vs. K. S. VARNA.

A.I.R. 1936 Lah. 523 = 163 I.C. 350.

Lahore High Court Rules—(Contd.)

Vol. V. Chap. 6 (b)—Power of Advocate or Vakil to plead or act without a power of attorney.

The rules framed by the Lahore High Court in their Rules & Orders, Vol. V, Chap. VI (b) relating to the powers and duties of advocates and vakils, reproduce generally the provisions of the C. P. Code. They forbid any advocate or vakil to act for any person in any court unless he has been appointed by instrument in writing as required by Or. 3, r. 4, C. P. Code, but they do not forbid an advocate or vakil to plead on behalf of any person without a Power of Attorney. An advocate or vakil engaged for the purpose of pleading only must according to rules file in Court a memorandum of appearance. (*Coldstream & Bhide, JJ.*)

RAMZAN vs. GOPAL DAS.

17 Lah. 456 = 38 P.L.R. 961 = A.I.R. 1936 Lah. 199 = 161 I.C. 764.

LAND ACQUISITION

Acquisition of land by public body without concern of convenience of owners—Such acquisition, if valid.

Public bodies should not exceed the limits of the authority committed to them by law; they must act in good faith and reasonably and with some regard for the interest of those who may suffer for the good of the community. Thus, when a public body acquires land without concern of the interest of the owner, such acquisition is liable to be set aside by a Court to safeguard the interest of the owner. It is immaterial that some future development of the situation might afford the plaintiff a different remedy. (*Guha & Bartley JJ.,*.)

DISTRICT BOARD OF CHITTAGONG vs. SASHIEHUSAN PAUL & ORS.

40 C.W.N. 687 = A.I.R. 1936 Cal. 225 = 162 I.C. 871.

Basis of compensation for uncertain tenure.

Where the tenure of the vendor is uncertain, he being a licensee liable to ejectment at any time, the measure of his interest is the amount of the compensation

Land Acquisition—(Contd.)

that he could claim if his license was determined. That amount is fixed by the regulations at the value of buildings. (*Monroe & Din Mohammed, J.*)

S. C. DHARJIBHOY vs. SECY. OF STATE.

38 P.L.R. 1071 = A.I.R. 1936 Lah 1010 = 164 I.C. 408.

LAND ACQUISITION ACT (I OF 1894)

Sec. 3 (b)—Person having a right of drainage if a "person interested."

A person having a right for drainage, that is, for the water which is on or comes on to the land of a person to flow over certain other ground is a person interested within the meaning of Sec. 3 (b), Land Acquisition Act, and can apply to the Collector for compensation at the proper time, on the vesting of the land in the Government under Sec. 16, and whatever rights of easement he had over the land comes to an end. (*Sulaman & C. J. & Bennet, J.*)

ABDUL KARIM KHAN vs. THE MANAGING COMMITTEE, GEORGE HIGH SCHOOL.

1936 A.W.R. 1011 = 1936 A.L.J. 1160 = A.I.R. 1936 All. 579.

Secs. 3 (d) and 49—Dispute regarding acquisition referred to Special Judicial Officer—his decision if an award and if appealable.

A dispute as to whether the whole or part of certain properties should be acquired was referred to a special Judicial Officer appointed by the Local Government under the provisions of Section 3 (d) of the Land Acquisition Act. The special Officer came to a certain decision on the point and the appellant being dissatisfied with the said decision filed an appeal against it. Held, that the decision was clearly a decision of a court specially constituted under statutory authority and no appeal lies from it. The Land Acquisition Act does not make any statutory provision for appeals from the decision of a special court constituted for deciding a dispute, except when that

Land Acquisition Act—(Contd.)

court makes an award. (*Madhavan Nair & Stone, JJ.*)

KRISHNA MOORTHY AIYAR vs. SPECIAL DEPUTY COLLECTOR OF LAND ACQUISITION, KOMBHAKONAM.

59 Mad. 554=71 M.L.J. 76=43 M.L.W. 338=1936 M.W.N. 193=A.I.R. 1936 Mad. 514.

Sec. 5 A—Civil Court, if may interfere with public body acting within jurisdiction but not bonafide.

Sec. 5 A of the Land Acquisition Act, constitutes no bar to a suit by the owner of a land for a declaration that a resolution by the District Board recommending the acquisition of a plot of land is ultravires and for an injunction restraining the carrying out of the resolution. Even when a public body is acting within the limits of its jurisdiction, the Court may and will interfere if it be shown that the discretion given by law has not been exercised bonafide. (*Guho & Bartley, JJ.*)

DISTRICT BOARD OF CHITTAGONG vs. SOSHI BHUSAN PAUL.

40 C.W.N. 687=162 I.C. 671=A.I.R. 1936 Cal. 225.

Sec. 9—Servant, if can accept notice on behalf of his master.

Where a notice under Sec. 9, Land Acquisition Act was handed over to the servant of the claimant who accepted it on behalf of his master communicated with his master and received instructions from him and preferred a claim, held, that the service was valid and good under Sec. 9 of the Act. (*Bhide & Currie JJ.*)

SECRETARY OF STATE vs. TIKKA JAGTAR SINGH.

A.I.R. 1936 Lah. 733.

Secs. 9 & 25 - Particulars of claim, if required to be given.

Under Sec. 9, Land Acquisition Act, a claimant must give particulars of his claim. If he fails to specify a certain item,

Land Acquisition Act—(Contd.)

he will not be awarded compensation for that particular item, notwithstanding the fact that the amount awarded does not exceed the total amount claimed. (*Bhide & Currie JJ.*)

SECRETARY OF STATE vs. TIKKA JAGTAR SINGH.

A.I.R. 1936 Lah. 733.

Sec. 23—Determination of amount of compensation—Prospective improvement of land on completion of project for which acquired if a proper consideration.

In determining the amount of proper compensation for land acquired for a particular project, speculations on the value likely to be conferred on the land by the completion of the project itself are not admissible. In all cases of valuation however, there must be some amount of conjecture and no exact exposition of the reasons for the conclusions arrived at is possible. (*Guho, Bartley & R. C. Mitter, JJ.*)

COLLECTOR OF DACCA vs. GOLAM AJAM CHOWDHURY & ORS.

40 C.W.N. 1143=A.I.R. 1936 Cal. 685.

Sec. 23—Principle of valuation—Frontage to highway or easy access to it, if to be taken into consideration.

In determining the value of a land to be acquired under the Land Acquisition Act, where the land is situated in a popular locality, frontage of the land i.e., immediate contiguity to highway, and where there is no frontage, propinquity or easy access to the road are elements to be taken into consideration. (*Guho & Bartley, JJ.*)

SECRETARY OF STATE vs. BHUPATINATH DEV.

A.I.R. 1936 Cal. 345.

Sec. 23—Determination of amount of compensation—Prospective improvement of land on completion of project for which acquired if a proper consideration.

In determining the amount of proper compensation for land acquired for a parti-

Land Acquisition Act—(Contd.)

ular project, speculations on the value likely to be conferred on the land by the completion of the project itself are not admissible. In all cases of valuation, however, there must be some amount of conjecture and no exact exposition of the reason for the conclusions arrived at is possible. (*Guho, Bartley & R. C. Mitter, JJ.*)

COLLECTOR OF DACCA vs. GOLAM AJAM CROWDHURY & ORS.

40 C.W.N. 1143 = A.I.R. 1936 Cal. 688.

Sec. 23 (2)—Owner using building for storing goods and for accommodation of customers from outside, whether in actual occupation of building.

Where a building is used by the claimant as his go-down for storing his goods and also for the accommodation of his customers who come from outside he is using the building for himself and therefore it is being used by him within the meaning of Sec. 39 (2) Land Acquisition Act read with Sec. 10 (2) (b) of the schedule to U. P. Town Improvement Act, 1919, and he is entitled to the extra compensation on account of compulsory acquisition. (*Solomon C. J. Bennet J.*)

SECRETARY OF STATE FOR INDIA vs. SUNDAR RAM.

1936 A.W.R. 1064 = 1936 A.I.J. 1289.

Sec. 23(1)—Government announcing in advance intention to acquire—Fall in price of the land—Market value if may be determined on the lower basis.

It is unfair that the Government should be able to reduce the compensation payable for compulsory acquisition by merely announcing in advance its intention to acquire a piece of land and thus throwing a 'cloud' on its market price before issuing notification required by the Act. The market price must be fixed with reference to the date of the notification under Sec. 4 irrespective of the previous position of the plot by Government notification and

Land Acquisition Act—(Contd.)

its effect, if any, on the market price. (*Bhide, J.*)

MAHAMMAD ISMAIL & ORS. vs. SECRETARY OF STATE.

A.I.R. 1936 Lah. 599.

Sec. 23(1)—Secondly, Scope of—Crops or trees grown between date of declaration of intention to acquire and date of collector's taking possession, if included.

Sec. 23 (1), secondly, Land Acquisition Act contemplates the value of the crops or trees that may have grown on the land between the date of the declaration of the intention to acquire and the date of the Collector's taking possession. (*Guho & Bartley JJ*)

BRUSAN CH. SAMANTA vs. SECRETARY OF STATE FOR INDIA.

40 C.W.N. 1034.

Sec. 23(2)—Market price if can be determined on the basis of a sale of an adjoining land for building a mosque.

It is not proper to estimate the market value of a plot of land on the basis of the price paid for an adjoining plot of land where it appears that the latter plot was sold for a nominal sum for the purpose of building a mosque and was obviously influenced by religious and charitable motives. (*Bhide J.*)

MAHAMMAD ISMAIL vs. SECRETARY OF STATE.

A.I.R. 1936 Lah. 599.

Sec. 23 (2)—Provision of payment of 15 per cent, if mandatory.

The provision contained in Sec. 23 (2) of the Land Acquisition Act for payment of 15 per cent in addition to the market price of the land acquired in the case of compulsory acquisition is mandatory and the Judge cannot refuse to grant the same. (*Bhide J.*)

MAHAMED ISMAIL vs. SECRETARY OF STATE.

A.I.R. 1936 Lah. 599.

Land Acquisition Act—(Contd.)

Sec. 34—Possession of land taken before award of compensation—Interest on value of land, if must be allowed from date of compensation.

The right to receive interest takes the place of the right to retain possession. Although Sec. 31, Land Acquisition Act. contemplates an award having been made at the time of taking possession, the foundation of the section is, that when compensation is payable and has not been paid, interest for non-payment must be given from the date of taking possession. (*Cornish & Varodachariar J.J.*)

REVENUE DIVISIONAL OFFICER, TRICHINOPOLY vs. VENKATARAMA AYYAR & ANR.

59 Mad. 433=71 M.L.J. 69=1986 M.W.N. 114=43 M.L.W. 190=A.I.R. 1936 Mad. 199=160 I.C. 957.

Sec. 34—"Deposited"—Meaning of—Collector if liable to pay interest under the section when compensation money erroneously deposited in Court.

The word "deposited" in Sec. 34 of the Land Acquisition Act refers only to actual fact of the deposit, subject to the condition that such deposit must be in the proper Court as specified in Sec. 31 (2). Accordingly, when the Collector deposits the compensation money in the proper Court, although in the erroneous view that there is no person competent to alienate the land, there is a deposit as contemplated by Sec. 34, and the Collector is not liable to pay interest under the section when the money is ultimately paid out to the person found entitled to it. (*R. C. Mitter, J.*)

SECRETARY OF STATE vs. JAI NARAIN CHUNDAR.

40 C.W.N. 989=165 I.C. 716=A.I.R. 1936 Cal. 525.

LAND ACQUISITION MINES ACT (XVIII OF 1925)

Secs. 5 & 6—Scheme and object, Persons working a mine restricted—compensation, to whom payable—assessment of compensation.

Land Acquisition Mines Act—(Contd.)

The effect of Secs. 5 and 6 is merely to provide that the restriction shall not be imposed unless the Govt. shall be willing to compensate all persons interested. The obligation to compensate follows upon the impositions of the restriction and is not dependant on an announcement by the Govt. that they are willing to pay such compensation. The compensation is payable not only to the person working the mines, but also to royalty-holders, but the amount of compensation will not exceed in aggregate the profits likely to accrue, if the coal locked up could have been raised. (*Courtney Terrel C. J. & Dhavle J.*)

SECRETARY OF STATE vs. LUDONA COLLIERY CO.

15 Pat' 510=17 P.L.T. 179=164 I.C. 360=A.I.R. 1936 Cal. 249.

LANDLORD AND TENANT

Abadi—House in Abadi falling down—Proprietor, if can take possession of site.

The mere fact that a Riaya's house in a village completely falls down, does not justify a Zemindar to have possession of the site unless the circumstances afford a reasonable ground for believing that the Riaya had abandoned all intention to rebuild it. In case of doubt the Zemindar might well give notice to the occupier of a ruined house requiring the latter to rebuild the house and intimating that in case the house was not rebuilt within a reasonable time, the Zemindar would treat the site as abandoned and would resume possession thereof. (*Niamatullah, J.*)

SHEO SAHAI vs. TILOK SINGH.

1936 A.L.J. 569=1936 A.W.R. 541=164 I.C. 205=A.I.R. 1936 All. 553.

Abadi—Occupation of a site in a town by a temple—presumption arising in case of agricultural village, if arises.

Presumption in the case of an agricultural village, where the origin of the tenure is unknown, is that the zamindar has allowed ryots to build residential houses in the abadi, one incident of such a tenure being that the tenure will terminate when the

Landlord and Tenant—(Contd.)

house falls down. Such presumption can not however, be drawn from the occupation of a site in a town by a temple, the temple not being a building which will fall down and of which the site will be abandoned. (*Bennet & Smith JJ.*)

KESHAVA PRASAD SINGH vs. Mst. BENI KUNWAR,

1936 A.W.R. 723=1936 A.L.J. 1058
=A.I.R. 1936 All. 631=164 I.C. 877

Abadi—Occupation of a house in an Abadi site not abandoned on destruction of the house—Zemindar, if can sue to eject.

The mere falling down of rooms and houses during the rainy season occupied by a ryot in the abadi does not give the Zemindar a right to sue for his ejectment. It is only where the site is abandoned that the site reverts to the zemindar. (*Sulaiman C. J. & Bennet J.*)

RANGOPAL vs. MT. GANGA DIN.

1936 A.L.J. 503=1936 A.W.R. 368=
163 I.C. 244=A.I.R. 1936 All. 383.

Abadi—House not appurtenant to holding—entry in Wajib-ul-arz as to tenant's right to retain house after giving up cultivation—Right of residence, if ceases with loss of holding.

Where a house in the Abadi site of a village is not appurtenant to the holding and there is a clear entry in the Wajib-ul arz of the village that a tenant is entitled to remain in possession of the house even when he gives up cultivation, the tenants who occupy houses have a right of residence in their houses independently of their holdings so that even if the holding is lost, their right of residence is not gone. (*Sulaiman C. J. & Bennet J.*)

RADHARI LAL vs. BISHNU NATH SINGH.

1936 A.W.R. 471=1936 A.L.J. 505

Alienation—Suit by landlord to challenge alienation by tenant by a registered document—limitation when begins to run.

A landlord brought a suit to set aside an alienation made by a tenant by a

Landlord and Tenant—(Contd.)

registered deed. The execution of the deed was effected a few days prior to registration. Held, that limitation commenced to run from the date of the execution of the deed. (*Coldstream & Abdul Rashid JJ.*)

DHUMAN KHAN vs. GURMUKH SINGH

17 Lah. 403=36 P.L.R. 287=A.I.R.
1936 Lah. 394.

Compensation—Stipulation that tenant would not be entitled to any portion of compensation on compulsory acquisition of the tenancy land, if binding.

A stipulation by the tenant that if the Municipality or the Government acquired the land (that is, the land of the tenancy) at any time for any purpose, then the landlord would get the compensation awarded therefore and the tenant with have no concern therewith is binding on the tenant whether the tenancy is governed by the T.P. Act or by the B. T. Act, but if the tenant has effected any improvement on the land, then he would be entitled to some compensation out of the compensation allowed for the lands acquired on account of improvements effected by him—measure of the compensation being assessed on evidence. (*D. N. Mitter & Patteson, JJ.*)

RADHANATH MAITY vs. KRISHNA CH. MUKHERJEE.

40 C.W.N. 722=63 C.L.J. 72=A.I.R.
1936 Cal. 249=165 I.C. 882.

Ejectment—Right of landlord to eject tenant—Onus of proving permanency of the tenancy.

A landlord is entitled to eject a tenant after service of notice to quit unless the tenant can prove that he has a right to remain on the land permanently. The onus lies on the tenant to prove the permanency. (*R. C. Mitter J.*)

GOLAM HOSSAIN OSTAGAR vs. ABU HAKKAR.

A.I.R. 1936 Cal. 351.

Ejectment—Suit for ejectment—Proof required from plaintiff.

Landlord and Tenant—(Contd.)

A person suing to eject another from a land to which the former claims title must prove his own title and cannot succeed by merely showing absence of title in the person sued. (*Varadachariar & Stoddart JJ*)

KADAMBARI DEVASWOM URULAN vs. SECRETARY OF STATE.

1936 M.W.N. 854=A.I.R. 1936 Mad. 191=162 I.C. 37.

Mortgage—Usufructuary mortgage by landlord in favour of tenant—right as mortgagee and as tenant, if merge.

Where the landlord executed a usufructuary mortgage of a plot of land in favour of a person holding that plot as his tenant, the tenants rights as mortgagee and as tenant do not merge. If the the tenant sells his right as usufructuary mortgagee, his vendee is not entitled to eject him, but can as usufructuary mortgagee, realise rent from the tenant. (*King C. J.*)

JAGMOHAN AHIR vs. RAM KISHEN MISIR

1936 O.W.N. 748=163 I.C. 922=A.I.R. 1936 Oudh. 322.

Nature of tenancy—Tenancy for dwelling purpose—major portion of the land used for agricultural purpose—tenancy, if, an agricultural one.

Where the express object with which the lease of a land was given was for dwelling and for residential purpose, the fact that the major portion of the land was put to a different use, namely, for cultivation purpose, does not make the tenancy an agricultural one. The object with which the case was executed is to be looked at. (*Mitter & Patteson JJ.*)

RADHANATH MAITY vs. KRISHNA CH. MUKHERJI

40 C.W.N. 722=63 C.L.J. 72=165 I.C. 682=A.I.R. 1936 Cal. 249.

Nature of tenancy—Inference of permanency of tenancy when may be drawn.

Landlord and Tenant—(Contd.)

Where for the purpose of establishing the permanency of a tenancy, the following facts were relied upon, viz., (1) that the tenancy was for residential purposes (2) that its origin was unknown, (3) that the rent had not been varied at any time, and (4) that there had been one or two transfers upon which the transferee had been recognised as tenant held, that the circumstances did not lead to the inference that the tenancy was a permanent one, and that unless there was a series of transfers of a tenancy for residential purposes of which the origin was unknown and a series of recognitions, the Court would not be right in inferring that the tenancy was in its origin of a permanent character. (*R. C. Mitter J.*)

SATYENDRA NATH BHADRA vs. CHARU SANKAR ROY CROWDHURY.

40 C.W.N. 888.

Nature of tenancy—Land given for building purposes—Erection by tenant of a permanent building—Rights of the tenants.

Where a building of a permanent nature is credited by a person on land given to him for building purpose, he has a right to remain in possession of the building so long as it stands. It is not for him to prove specifically what were the terms on which the building was allowed to be erected. (*Sulaiman C. J. Bennet J.*)

KANHAIYA LALL vs. ABDULLA.

1935 A.W.R. 178=1936 A.L.J. 201
A.I.R. 1936 All. 385=160 J.C. 866.

Nature of tenancy—Tenancy created for residential purpose—Land used for agricultural purposes—Tenancy whether governed by B. T. Act or by T. P. Act.

Whether a tenancy is granted by the Bengal Tenancy Act or by the Transfer of Property Act depends upon the purpose for which the tenancy was created. User of the land for agricultural purposes where the tenancy is shown to have been created for residential purposes, does not bring the tenancy under the B. T. Act. (*J. N. Mitter, & Patterson JJ.*)

RADHANATH MAITY vs. KRISHNA CH. MUKHERJEE.

40 C.W.N. 722=63 C.L.J. 72=165 I.C. 682=A.I.R. 1936 Cal. 249.

Landlord and Tenant—(Contd.)

Occupancy right—Grant of occupancy right by landlord, if permissible.

A right exactly similar to a right of occupancy can be conferred on a tenant expressly by a grant by the landlord, in a locality where the Landlord and Tenancy Procedure Act, 1869 is in force. (*Guha & Bertley JJ.*)

JOGENDRA NARAYAN DHAR vs. ASKARULLA.

40 C.W.N. 1301.

Occupancy right—Grant of mukarrari right to a raiyat—effect of.

Where the proprietors of an estate grants an occupancy raiyat thereof a permanent lease such grant has not under the general law, the effect of extinguishing the right of occupancy possessed by the raiyat and so render him liable to eviction (*Wort & Fazl Ali JJ.*)

KALI SINGH vs. MATRU SINGH.

15 Pat. 584.

Partition—Partition between landlords—Co sharer suing for his share of rent—rights of the tenant.

Except under the Estates Partition Act there is no procedure by which the tenants themselves can be brought on the record or can be brought before the Court to show that they have agreed to the partition which is about to take place between the co-sharer landlords. Therefore where after a partition, a co-sharer landlord sues a tenant for rent, it has to be seen whether the tenant agreed to the partition and the apportionment of the rent. (*Wort J.*)

DEO NARAIN SINGH vs. LILA KUR

17 Pat. L. T. 380—A.I.R. 1936 Pat. 99—165 I.C. 1979.

Partition—Partition of landlord's interest—tenant's interest, how affected.

A Batwara proceeding between the landlord and his co-sharers does not confer any right on the tenants which they had not

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before the proceeding. 39 I. C. 98 referred. (*Wort J.*)

NAGA RAY vs. LUCHI RAY.

A.I.R. 1936 Pat. 285—162 I.C. 875.

Possession—Purchaser leasing out the same to wife of the vendor—Question of being put in possession, if can be raised in a suit for rent by the purchaser.

The owner of a land sold the same to a certain person who on the same day leased out the land to the wife of his vendor. Subsequently in a suit for rent by the purchaser the wife raised the plea that she had not been put in possession. *Held*, that such a question did not arise in the circumstances of the case as she got such possession of the demised land as it was possible to give her. (*Nasim Ali & Henderson, J.*)

SANARATULLA SHEIKH vs. MANIKJAN BIBI.

A.I.R. 1936 Cal. 323.

Possession—Interest of tenant sold in execution of money decree—subsequent sale of holding by landlord in execution of rent decree—landlord's suit for Khas possession if may be resisted by the previous purchaser.

The interest of a tenure-holder had been put up to sale in execution of a money decree and purchased by one K, who however did not obtain delivery of possession. Subsequently, the landlord in ignorance of the sale to K filed a rent suit impleading all the tenure-holders, except Y, and having obtained a decree in such suit, purchased the entire holding in execution thereof, and served the usual notice under Sec. 167, B. T. Act. On the landlord, thereafter, suing for khas possession the original tenure-holder took the plea that since in the landlord's suit, K, had not been made a party, the decree passed in that suit was not a rent decree, but a mere money decree, *Held* that without obtaining a declaration in the presence of both the plaintiff and K, that K had an interest in the tenure and was

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liable for rent, such a defence was not open to the original decree holder. (*Cunliffe & Henderson JJ.*)

RAMESH CH GUHA vs. DEENA NATH MISTARI.

63 Cal. 846=42 C.L.J. 483=182 I.C.
384=A.I.R. 1936 Cal. 178.

Possession—Suit for possession on redemption of mortgage—defendant claiming land as occupancy holding—entry as such in record of rights—defendant not in possession at time of mortgage—defendant, if can succeed.

The plaintiff sued for possession of a piece of land on redeeming a mortgage. The defendant contended that the land was his ancestral occupancy land and he was entitled to continue to hold it paying only the recorded cash rent. It was found that the defendant had been entered in the Record of rights as an occupancy raiyat. Held, that the defendant not having been brought on to the land either by the mortgagors or by the mortgagees he had no right as against the mortgagor when the latter came into possession to remain in occupation or possession of the land. (*Courtney Terrell C. J. & Khaja Mohammed Noor J.*)

DEORARAN SINGH vs. DEORAJ AHIR.

17 P.L.T. 797.

Rent—Tenant holding several plots under butwara deed, dispossessed from one plot—suspension of rent if allowed.

The right to suspend payment of rent by a tenant on the ground that he has been dispossessed from one out of several plots allotted to him in a butwara proceeding, continues to apply to all the plots of the tenant's holding. (*Courtney-Terrell C. J. & Dhavle J.*)

KHUBALAL SINGH vs. ISHRI PRASAD.

15 Pat. 443=17 P.L.T. 155=161 I.C.
109.

Rent—Kabuliyat describing tenant's holding—total area and lump rental stated
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and rate showing the basis of lump rental given—tenant evicted from a portion of his holding if can claim suspension of rent.

In a suit for rent of a holding, the defendant pleaded that he had been dispossessed by the landlord from a portion of the holding and was therefore entitled to complete suspension of rent. The Kabuliyat showed the raiyat's holding as consisting of a number of land, each separately specified and described; the total area with the lump rental was also stated and a rate was mentioned as showing the basis on which the lump rental had been assessed. Held, that the lease was a lease of an ascertained block of lands at a lump rental, and on the tenant being evicted from a portion of his holding, the doctrine of suspension of a rent operated. (*Rowland J.*)

BRUNESHWAR NATH PANDRY vs. GUDAR NATH PANDEY.

17 P.L.T. 386

Rent—Suspension of rent—tenant when entitled to suspend payment of rent in case of partial eviction.

An act of a permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof operates as eviction involving the penalty of total suspension of rent. But a mistake about the extent of the premises demised for some other bonafide act resulting in unintentional dispossession of the tenant from a portion of the tenancy is not such dispossession as would attract the doctrine of suspension. (*Guho & Bartley JJ.*)

JAGADISH NATH ROY vs. SURENDRA PRASAD LAHIRI & ANR.

40 C.W.N. 166

Rent—Suspension of rent—test of liability for total suspension of rent,

The test to be applied in deciding whether the doctrine of suspension of rent should

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apply or not is, whether the tenancy is an indefeasible tenancy and whether there has been interference by the landlord with the due enjoyment of the premises demised. In determining the first point the mere fact that the tenancy is governed by one lease and therefore might be regarded as one tenure is not enough; what is to be seen is whether in fact the parcels of the entire property demised are such that dispossession from one of these parcels necessarily interferes with the due enjoyment of the others. (*Guho & Bartley JJ.*)

JAGADISH NATH ROY vs. SURENDRA PROSAD LAHIRI.

40 C.W.N. 166.

Rent—Tenant, when can claim abatement of rent on the ground of encroachment on the leased premises.

A tenant claiming suspension and abatement of rent on the ground of an encroachment on the leased premises by the landlord must show that by the encroachment in question, the landlord has done something of a grave and permanent nature with the intention of permanently depriving the tenant of a portion of the subject of the demise. An encroachment of a few inches caused by the erection of a platform, which is capable of being demolished in a short space of time cannot be said to be of a permanent or of a grave character so as to constitute an eviction, and to entitle the tenant to claim suspension of rent. (*Mc Nair J.*)

NISHI KANTA SARKAR vs. SIR DEVID EZRA.

A.I.R. 1936 Cal. 135.

Rent—Right of Government to levy assessment on land—Exemption when can be claimed.

The Ruling power in India is entitled as a matter of right to levy such assessment on land as it thinks proper, and if any one wants to claim any exemption from liability to pay such assessment whether it is called land revenue or ground rent or by any other name, he must establish that exemption by

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sufficient evidence. It is not for the Crown to prove that it has right to levy assessment on land. (*Pandrayan Rao J.*)

SECRETARY OF STATE FOR INDIA vs. K. SARANGA PANI AYYANGAR

1936 M.W.N. 386=161 I.C. 1002=
A.I.R. 1936 Mad. 320.

Rent—Document stating rent to be a fixed sum for year—provision that rent would be increased or decreased, if area to be found more or less—rent, if liable to be enhanced.

A document stated that a raiyati right was being conferred on the tenant. The right so conferred was expressly made heritable, and the rent was fixed at a certain sum per year. It was further provided that if on measurement the area was found to be more or less the rent would be increased or decreased according to the rent mentioned in the document. The tenant was not to cut old trees or excavate tanks, but there was no provision restricting his right to transfer the holding. Held, that having regard to the terms of the document as a whole, the rent was intended to be fixed in perpetuity. (*R. C. Miller J.*)

NAGENDRA MOHAN NATH vs. JOGENDRA NATH SEN & ORS.

63 C.L.J. 579.

Rent—Rent free grant—non payment of rent creates no presumption—entry in record of rights—effect.

Mere non-payment of rent for a period of 12 years or more is not sufficient to establish a rent free grant. When there is an entry in a record of rights to the effect that a holding is rent free, the tenant must prove some contract or settlement which allows him to hold the land rent free. It cannot be proved simply by the entry in the record of rights. (*Wort J.*)

SURPAT SINGH vs. GENE JHA.

A.I.R. 1936 Pat. 315=162 I.C. 999.

Rent—Suit for settlement of fair rent on ground of accretion—defendant pleading

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that at the time of the passing of the B. T. Act, predecessors of landlord had no right to additional rent—burden of proving plea.

In a suit by the landlord under the B. T. Act, for settlement of fair rent in respect of accretions to the tenure of the tenants, the latter contended that at the time of the passing of the B. T. Act, the predecessors of the landlord had no right to additional rent, *Held*, that the burden of proving the plea taken by the tenants rested on them and they had to show that when the B. T. Act, was enacted, the predecessors of the landlord had no right to enhancement of rent. (*Cumliffe & Henderson JJ*)

KHAJA HABIBULLA vs. BEPIN CH. RAI.
A.I.R. 1936 Cal. 454.

Tenancy—Non payment of rent by tenant, if creates title by adverse possession,

The mere non-payment of rent by a tenant does not cause cessation of the relationship of landlord and tenant or convert the possession of the tenant into adverse possession. (*Jai Lal J.*)

GIRDHARI RAM vs. QASIM & ORS.

38 P.L.R. 504 = A.I.R. 1936 Lah. 461 = 163 I.C. 592.

Tenancy—Tenancy in the name of a dead person—another person occupying the land—such person, if can be regarded as the tenant.

Where the tenancy was in the name of a deceased person, and another person was occupying the land in the character of the *de facto* guardian of the tenant's son, such person cannot be recognised as a tenant in his own right. A I. R. 1924 Cal. 535, distinguished. (*Mitter & Patterson JJ*.)

RADHANATH MAITY vs. KRISHNA CH. MUKHERJI & ORS.

40 C.W.N. 722 = 63 C.L.J. 72 = 165 I.C. 632 = A.I.R. 1936 Cal. 49.

Title—Tenant, if can question title of person inducting him on the land.

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If a tenant has been inducted upon the land by a person, the tenant cannot question the title of that person who has inducted him on the land. The tenant cannot raise the question that the person who let him into possession was merely a *benamdar*. 8 Cal. 238, 11 Cal. 519, 28 Mad. 526 & 34 Bom. 329 relied on; 31 Mad. 461 & 26 M. L. J. 597 dissented from. (*R. C. Mitter J.*)

DINGBANPHU GAN vs. MAKIM SIRDAR

42 C.W.N. 460 = A.I.R. 1936 Cal. 93 = 163 I.C. 468.

LEASE.

Construction—"Bemiadi"—Term, if applicable to a lease from year to year,

It is impossible to apply the term "Bemiadi" to a lease from year to year. The question depends not so much upon the use of the term but the proper construction of the deed to which the term is applied. (*Wort J.*)

DARBAR SAHEB vs. BARE LAL KANDARP NATH SAH DEO.

17 P.L.T. 485 = 162 I.C. 797 = A.I.R. 1936 Pat. 275.

Construction—Bemiadi Thicca Patla—Grant to lessee and his heirs—Fixed rent—Right to sub-lease granted—Lease if to be construed as a permanent one

Where a lease described as a *Bemiadi thicca patla* provided that the lessee and his heirs were to pay a fixed rent to the lessor and to his disciples and the lease permitted the lessee to enjoy the property in any manner he thought proper and empowered the lessee to let the lands out to tenants if he thought fit, *held*, that the lease was to be considered a permanent one. (*Wort & Rowland JJ.*)

DARBAR SAHEB vs. BARE LAL KANDARP NATH SAH DEO.

17 P.L.T. 485 = 162 I.C. 797 = A.I.R. 1936 Pat. 275.

Construction—Lease of a supply of water Implication of.

The lease of a supply of water implies the continuance of that supply so far as in

Lease—(Contd.)

the power of the lessor during the whole period of the lease. Where, therefore the supply of water depends on the repairs of certain embankments, the plaintiff has the duty even when there was no stipulation whatever in the lease that the lessee was bound to repair the embankments, to carry out the usual repairs of the embankments for ensuring the supply of water. (*Bennet & Smith JJ.*)

KAMAL DEBI vs. DR. SHRI KHUDADAD.

1936 A.L.J. 625 = 1936 A.W.R. 533 = 163 I.C. 872 = A.I.R. 1936 All. 522.

Construction—Terms of lease providing for payment by lessee of all taxes, rates, etc. which were to be charged, assessed or imposed upon the mines—obligation, if limited to charges on mines themselves.

Under the terms of a mining lease, the lessee was to pay and discharge all taxes, rates, assessments, impositions, etc., charged assessed or imposed upon the said mines by the Government of India or Local Government. In a suit by the landlord to recover road cess, mine cess and income tax it was contended by the tenants that these impositions which were on the landlords did not come within the covenants in the lease as they were not charged upon the mines but were charged upon the landlord in respect of the mines. *Held*, on a consideration of the lease, that the obligation under it could not be limited to charges on the mines but extended to charges imposed in respect of them on persons, viz., landlord or tenants, and that the tenant undertook the liability to pay all charges of a recurring nature, whether imposed on the mines or on the lessor or the lessee in respect of them. (*Nasim Ali & Edgley JJ.*)

BENGAL COAL CO., LTD., vs. KISHORI LAL SINGH DEO.

40 C.W.N. 1118 = A.I.R. 1936 Cal. 459 = 165 I.C. 615.

Construction—Lease acknowledging occupancy rights of lessee to be perpetual and conferring certain duties on the lessee—nature of right conferred.

Lease—(Contd.)

A lease stated that the occupancy right enjoyed by the lessee which was for life, was to be perpetual at a certain fixed rent and imposed on the lessee, certain obligations to provide for the pay of the chaukidar and the patwar and for the village expenses. The lease further stated that the lessees were to remain in possession and occupation generation after generation, according to the conditions of the lease. *Held*, that the lease conferred upon the lessees merely heritable occupancy rights, in the place of the occupancy rights for life previously enjoyed by them, and the non-reservation of the right of re-entry did not necessarily indicate any intention of conferring a transferable estate. (*King C. J., & Nanavatty J.*)

HIRA LAL vs. GAJRAJ KURR.

111 Luck. 203.

Covenant—Covenant restricting transfer, if binding on lessee's assignee.

A covenant running with the land binds not only a lessee but also assignees from him although they are not expressly mentioned. An expressed covenant not to transfer the demised premises without the consent of the landlord is a covenant running with the land and therefore it is enforceable against a person who purchased the lessee's interest in execution of a decree for rent obtained by the lessor against the lessee. (*Dhauve & Agarwalla JJ.*)

THAKURDOVAL SINGH, vs. PRAMATHA NATH MITRA.

15 Pat. 673 = 17 P.L.T. 502 = 164 I.C. 811 (2) = A.I.R. 1936 Pat. 493.

Covenant—Lessor's right of re-entry on breach of covenant—matters that must be ascertained.

Where it is claimed that a lessor is entitled to re-enter by reason of the lessees' breach of a covenant, it is first necessary to ascertain what it was that the lessee covenanted to do or not to do, then to see, first, whether the agreement provides for re-entry on breach of such covenant; and finally whether there

Lease—(Contd.)

has been a breach of the covenant by the lessee, (*Dhavia & Agarwalla JJ*)

PANCHAM SINGH vs. PROMOTHO NATH MITRA.

15 Pat. 680=17 P.L.T. 554=A.I.R.
1936 Pat. 450=164 I.C. 358.

Covenants—Lease of colliery—Under-taking by lessee to pay royalties without deduction and pay all assessments in the nature of public demand—Such covenant, if covers assessments, not on, but in respect of mines or lessor's shares thereof.

The lease of a colliery contained a covenant that the stipulated "royalties shall be paid free from any deductions, also all taxes rates, assessments and impositions whatever being in the nature of public demand which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof." *Held*, that the covenant was not limited to the lessee's share of the taxes or only to the taxes charged on the mines, but covered both lessor's and the lessee's share of all charges of a recurring nature being public demands whether they were described in the statute as imposed on the mines or on the lessor or the lessee in respect of them; that accordingly the covenant covered road cess and mine cess. (*Nasim Ali & Edgely JJ*)

BENGAL COAL CO. LTD., vs. JONARDAN KISHORI LAL SINGH DRO.

40 C.W.N. 1118=A.I.R. 1936 Cal. 459
=165 I.C. 615.

Covenants—Lease in favour of several persons—share of each specified—breach of covenant by some—proviso for re-entry, if would operate against all.

Where a lease is in favour of several persons, and the share of each is specified, and there is a covenant for re-entry on transfer of the entire property or even a portion of it, the breach of the covenant in restraint of alienation by one the lessees cannot entitle the landlord to re-enter on the whole property, but he can only re-enter on the share of the lessee committing the breach unless there is an express clause in the agree-

Lease—(Contd.)

ment giving the landlord right to re-enter on the whole interest of the lessees. (*Dhavia & Agarwalla JJ*.)

PANCHAM SINGH & ORS. vs. PROMOTHO NATH MITRA & ORS.

15 Pat. 680=17 P.L.T. 554=A.I.R.
1936 Pat. 450=164 I.C. 358.

Ejectment—Notice of ejectment offering compensation to tenant for structures—no provision as to compensation in lease deed—landlord if entitled to eject without payment of compensation.

Where the landlord, in a notice of ejectment given to his tenant undertook to compensate the latter for the structures raised by him on the leasehold land, but the lease deed contained no provision as to the payment of compensation, and the landlord ultimately sued the tenant for ejectment without even tendering the compensation offered in the notice of ejectment, *held* that the failure to tender the compensation, rendered the notice ineffectual. Although, according to the terms of the lease, the landlord was not in any way bound to pay compensation, yet, by offering to pay compensation, he must be deemed to have waived any express rights which he may have had under the terms of the lease. (*Edgely JJ*.)

SHAMBHU CHANDRA HALDAR vs. KANAI LAL GOSWAMI & ORS.

A.I.R. 1936 Cal. 581.

Forfeiture—Part forfeiture, if permissible.

A lessee by denying the title of the lessor incurs forfeiture, but it is at the option of the landlord to take advantage of the forfeiture or not, and if he elects not to do so, the forfeiture is waived. It is not however open to a landlord to treat the tenancy as forfeiture in part and subsisting as to the remainder. (*Venkataramana Rao J.*)

VADDAPARTI SAGRAYYA vs. VODDURI SOORANA.

A.I.R. 1936 And 252

Lease—(Contd.)

Rent—Joint lease one lessee put in possession—other lessee, if can deny liability to pay rent.

When two persons execute a joint lease, and one of them is actually put in possession, the other cannot avoid liability for rent, unless he can show that he requested the lessor to put him in possession, but the request was not complied with, or that the lessor has in any way obstructed him in entering into joint possession of the premises. 39 Mad. 499 relied on; 40 I. C. 684 distinguished. (*Tek Chand J.*)

NUR MOHAMMED vs. AHMED ALI KHAN,

A.I.R. 1936 Lah. 815 = 165 I.C. 56.

Rent—Lease providing that rent not to be enhanced and in event of diluvion not to be reduced—landlord, if entitled to settlement of rent on accretion,

Certain area of land was settled after measurement at a certain rental and the kabuliyat provided that there was to be no enhancement of rent by the landlord, nor any abatement of rent in the event of diluvion. On there being an increase in the area of the tenancy by accretion, the landlord applied for settlement of fair rent. *Held*, that it nowhere having been stated in the kabuliyat that the landlord was willing to surrender his right to additional rent for any land which might subsequently form by accretion, the landlord was entitled to settlement of fair rent for the land accreting to the tenure of the tenant. (*Cunliffe & Henderson JJ*)

KHAJEE HABIBULLA & ORS. vs. BRPIN CH. RAI.

A.I.R. 1936 Cal. 454.

Rent—Rent created charge on property—half rent payable by plaintiff and half to proforma defendant—suit by plaintiff for share of rent—charge on the whole property, if enforceable.

The terms of a lease contained a clear stipulation that the rent was a charge on the property. There was also a stipulation that half the rent was payable to the

Lease—(Contd.)

plaintiff and half to the proforma defendant. When the plaintiffs sued for their share of rent bringing the parties entitled to the other eight annas rent as defendants on the record, *held*, there was no defect in the frame of the suit and the plaintiff was entitled to get a charge on the whole property. (*Muhammed Noor & Rowland JJ.*)

AMAL KRISHNA ROY vs. KEDAR NATH BANERJI.

A.I.R. 1936 Pat. 306 = 163 I.C. 175 (1)

Rights of lessee—Lessee paying lessor's decree-holder—Lease failing—Lessee, if can get refund.

Where a lessee pays money to a decree-holder of the lessor on the basis of his lease, and the decree is subsequently set aside, the lessee has a right to get a refund of the money from the person to whom he paid the money.

MAGHI MALL vs. L. GANPAT RAI.

38 P.L.R. 717 = A.I.R. 1936 Lah. 212 163 I.C. 121.

Rights of lessee—Tenant, if entitled to appropriate ghooling stones lying on the surface within his tenure.

In a lease, the lessor ordinarily retains all rights in mines and quarries, whether open quarries, or those involving mining operations and tunnelling beneath the surface. An ordinary agricultural tenant is not disentitled to use the surface and take therefrom what he finds on the surface. He may collect and remove ghooling stones lying on the surface. I. C. L. J. 526 & 20 C. W. N. 1135 relied on. (*Rowland J.*)

RAS BEHARI MONDOL vs. JAGADISH CH DAS.

160 I.C. 114 = A.I.R. 1936 Pat. 111.

Sale—Leasehold put up to auction in execution of rent decree declaring charge against such leasehold by lessor after disclaimer, effect of.

A sale in auction of the leasehold after the disclaimer in execution of a decree for

Lease—(Contd.)

rent obtained by the lessors will not have the effect of resuscitating the leasehold even though the decree may have created and declared a charge on the leasehold and the lessor will not acquire any title by purchase in such sale. (*Mukerjee & Jack J.J.*)

SATYA PRIYA GHOSAL vs. BARID BARAN MUKHERJEE.

63 Cal. 1123 = 40 C.W.N. 846.

Sub-Lease—*Provision in lease prohibiting sub-letting without landlord's consent—effect.*

When a lease contains a covenant against sub-letting without the landlord's consent, a sub-lease without such consent is not invalid, but is liable to be affected by the forfeiture of the head lease. The lessee is responsible to the sub-lessee for a covenant for quiet enjoyment, but he may protect himself by making his contract with the sub-lessee subject to the landlord's consent. The lessee must however apply for such consent within the time fixed or within a reasonable time failing which the sub-lessee may repudiate the lease. (*Amir Ali J.*)

BATTERSBY vs. DE CRUZE.

63 Cal. 31.

Surrender—*Karnavan granting lease of property—Lessee effecting improvements and later mortgaging his interest Subsequent fraudulent surrender to landlord who taking surrender with notice of mortgage—Validity of surrender as against mortgagor.*

The first defendant leased some Tarward properties to the third defendant. The latter effected considerable improvements in the property and subsequently executed a mortgage with possession to the plaintiff who leased it back to the third defendant on the same date. Subsequently the plaintiff gave the third defendant a notice terminating the tenancy and demanding possession of the property but before he could sue for ejectment the third defendant fraudulently surrendered possession of the property to the first defendant who took

Lease—(Contd.)

the surrender with notice of the mortgage by the third defendant in favour of the plaintiff. *Held*, that the surrender by the third defendant of his interest in the property when there was a mortgage outstanding against it was not binding on the mortgagee, as under the law the third defendant was entitled to remain in possession as a lessee till he was re-imbursed for the improvements effected. The surrender could not operate to the prejudice of the plaintiff and the latter was therefore entitled to the property as against the first defendant. (*Vankataramanna Rao J.*)

LAKSHMI vs. KALU.

1936 M.W.N. 121 = 43 M.L.W. 509
= 71 M.L.J. 82 = A.I.R. 1936 Mad. 422,
= 162 I.C. 893

LEGAL PRACTITIONER.

Counsel stating that he has no instructions—reasons, if must be specified.

It is not proper for Counsel either in the High Court or in Courts below to merely state that they have no instruction. Counsel should clearly specify what is the reason of their failing to proceed with the case. It may be that their instructions have been withdrawn or it may become other reason. But whatever the reason is, Counsel should clearly state it to the Court. (*Sulaiman C. J. & Bennet J.*)

LACHMI NARAIN vs. SHANKER LAL.

1936 A.W.R. 791 = 1936 A.L.J. 902 =
A.I.R. 1936 All. 670 = 164 I.C. 827.

Counsel filing precis without definite instruction from client, if entitled to fees

It is no business of a counsel to file precis on his own behalf without definite instruction from his client, and if there are several counsels for a client, it is only appropriate that either they should all agree to file the precis or that one of them shall have written instructions from his client for filing the same. In any case, no precis should be filed before the fee is

Legal Practitioner—(Contd.)

deposited, and if a counsel files it, he does so at his own risk. (*Sulaiman C. J.*)

RAGHURAJ SINGH vs. MST. MUSTAFI BEGUM.

1936 A.W.R. 55.

Power of Advocates in India to compromise.

The power to compromise an appeal is an implied power inherent in the position of an Advocate in India, and therefore no power of attorney is necessary to empower a counsel to agree to valid and binding compromise. An advocate who is authorised only to appeal may exercise his powers to compromise the appeal. (*Coldstream & Bhide JJ.*)

RAMZAN vs. GOPAL DAS.

17 Lah. 436=38 P.L.R. 961=A.I.R. 1936 Lah. 199=161 I.C. 764.

Fees paid to legal practitioner, when should be allowed by way of costs—certificate by the pleader to whom fees paid, if enough.

When an application is made by a party that a stated sum paid by him as pleader's fees should be allowed to him by way of costs, the judge has to be satisfied that the payment of the fee was made to the legal practitioner; he may of course accept a certificate given by the legal practitioner if it is un rebutted, or in any case if he believes it in preference to any other evidence which may be before him; but he must be satisfied that the payment was made. (*Allsop J.*)

SARAJURAM SAHU vs. DULARNA BIBI.

1936 A.W.P. 384=1936 A.L.J. 507=A.I.R. 1936 All. 652=162 I.C. 53.

Legal practitioner appointed receiver, himself conducting case—his fees, if can be taxed as costs.

Where a legal practitioner was appointed a receiver of the estate of an insolvent and he applied under Sec. 54 of the Provincial Insolvency Act, for annulment of a mort-

Legal Practitioner—(Contd.)

gage executed by the insolvent and the receiver himself conducted the case and the Insolvency Court directed that legal fees be taxed as costs even though the receiver did not pay this sum to any legal practitioner, held, that a legal practitioner's fee could not be taxed as ordered by the Lower Court. According to the rules only such sums can be taxed as legal practitioner's fee has been actually paid and certified by the legal practitioner to whom it has been paid. (*Niamatulha & Smith JJ.*)

ABDUL SATTAR vs. OANKAR NATH.

1936 A.L.J. 695=1936 A.W.R. 585=A.I.R. 1936 All. 489=163 I.C. 831.

LEGAL PRACTITIONERS ACT (XVIII OF 1879)

Sec. 13 (f)—Action under the Act against pleader for improper behaviour before magistrate—matters to be taken into consideration.

In proceedings under Sec. 13 of the Legal Practitioner's Act for the purpose of taking disciplinary action against a pleader who has been convicted under Sec. 228, Penal Code, for improper behaviour before a magistrate, it is right and sensible that the Court should consider the setting in which the pleader acted as he did, as also the fact that the act was not done under normal circumstances. The peculiar circumstances of the case should also be taken into consideration in deciding upon the period of suspension from practice that should be ordered. (*Page C. J. & Mya Bu J.*)

H. A LOWER GRADE PLEADER, IN THE MATTER OF.

A.I.R. 1936 Rang. 175=162 I.C. 534=37 Cr. L.J. 623=1936 Cr. C. 333.

Secs. 13 & 14—Client unable to write—pleader having name signed by client's nephew—conduct of the pleader, if improper.

A pleader who wanted the signature of his client on an application, finding that the latter was unable to sign on account of a swollen hand allowed the client's name to

Legal Practitioners' Act—(Contd.)

be signed by his nephew. *Held*, that the conduct of the pleader though improper did not show such a moral defect in his character as to render him unfit to perform his duties as a pleader, and it was not necessary to take any disciplinary action against him. (*Page C. J. & Ba U J.*)

A LOWER GRADE PLEADER, IN THE MATTER OF.

14 Rang. 152 = A.I.R. 1936 Rang. 177 = 162 I.C. 887 = 37 Cr.L.J. 721 = 1936 Cr.C. 326.

Sec. 14—Subordinate Court, when can enquire into the conduct of pleader.

It is manifest from the language used in Sec. 14 of the Legal Practitioners Act that it is only when in the course of proceedings before it, a subordinate Court has reason to suppose that a pleader has been guilty of misconduct that the subordinate Court is at liberty, without reference to the High Court, to enquire whether the pleader had been guilty of misconduct or not. 11 B. L. R. 111 overruled; 49 Cal. 850 dissented from. (*Page C. J. & Ba U J.*)

U. THEIN NYUN vs DIST. SUPERINTENDENT OF POLICE, MAUBIN.

13 Rang. 737 = 162 I.C. 958 = A.I.R. 1936 Rang. 158 = 37 Cr.L.J. 510 = 1936 Cr. C. 242.

Sec. 14—Proceeding under the Section if can be taken in respect of actions outside Court.

A Court is competent to take cognisance under Sec. 14, Legal Practitioners Act of the action of a pleader only in respect of proceedings taken under the Section in respect of a proceeding in another Court. (*Page C. J. & Ba U J.*)

A LOWER GRADE PLEADER, IN THE MATTER OF.

14 Rang. 152 = A.I.R. 1936 Rang. 177 = 162 I.C. 887 = 37 Cr.L.J. 721 = 1936 Cr. C. 326.

LETTERS PATENT (BOMBAY HIGH COURT)**Sec. 15—New point, if may be raised in Letters Patent appeal.**

In an appeal under the Letters Patent, an appellant is not entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal has been preferred. The question is one of practice, though it does not mean any absolute prohibition. 36 Bom. L. R. 1052 relied on. (*Broomfield & Macklin JJ.*)

SATTAPPA GURUSATTAPPA HUKERI vs. MAHOMED SAHEB.

60 Bom. 516 = 83 Bom. L.R. 221 = A.I.R. 1936 Bom. 227 = 163 I.C. 305.

Cl. 26—Omission to sum up evidence, if a ground on which the High Court can interfere under the Letters Patent.

The omission to sum up the evidence to the jury, and a consequent failure to comply with the provisions to Sec. 297, Cr. P. Code, amounts to an error of law to bring the case within Cl. 26 of the Letters Patent of the Bombay High Court. But simply because there is a misdirection, it does not follow that the Court has no option but to set aside the verdict of the jury. Cl. 26 merely provides for a review of the case. (*Beaumont C. J., Broomfield & Wadia J.*)

EMPEROR vs. PUTTAN HASSAN.

60 Bom. 599 = 35 Bom. L.R. 19 = 160 I.C. 1060 = A.I.R. 1936 Bom. 52 = 37 Cr. L. J. 366 = 1936 Cr. C. 164.

Cl. 26—Court of review, if can set aside verdict, where there has been no illegality, but merely an irregularity.

Although Sec 537, Cr. P. Code, does not in terms apply to a case dealt with under Cl. 26 of the Letters Patent, the principle underlying that section should be applied. Where there has been no illegality in the mode of trial but only some irregularity in the process of trial, the Court of review is not entitled to set aside the verdict or judgment, unless it is satisfied that the irregularity has led to a miscarriage of

Letters Patent—(Contd.)

justice or has prejudiced the accused. (*Beaumont C. J., & Broomfield & Wadia JJ.*)

EMPEROR *vs.* PUTTAN HASSAN.

60 Bom. 599=38 Bom. L.R. 19=A.I.R.
1936 Bom. 52=160 I.C. 1063=37 Cr.
L.J. 366=1936 Cr. C. 164.

LETTERS PATENT, (CALCUTTA HIGH COURT)

Cl. 12—*Leave under the clause—revocation of leave, if possible on grounds of hardship, humanity or collusion.*

Where a pronote is executed in Calcutta but outside the Original jurisdiction of the High Court and then it is endorsed over to a party within its jurisdiction, there can be no such hardship on the Defendant, if a suit is brought by the endorsee on the Original side, as will justify the Court to revoke a leave granted under cl. (12) of the Letters Patent to the endorsee. (*Derbyshire C. J., & Costello J.*)

BHABANI PROSANNA LAHIRI *vs.*
RADHIKA BHUSAN ROY.

40 C.W.N. 1349.

Cl. 12—*Application to revoke leave granted under cl. 12 if can be made after steps taken in a litigation.*

Even if the defendants, the makers of the promissory notes as also the majority of the plaintiffs reside outside the jurisdiction of the court, and even if the only part of the cause action on which the plaintiffs rely for the purpose of jurisdiction is an assignment, still where preliminary steps have been taken in litigation, by way discovery, adjournment by consent and where the suit has been allowed to appear on the prospective list, a leave granted under cl. 12 of the Letters Patent ought not to be revoked. Such application should always be made at the earliest possible opportunity (*Panchridge J.*)

HARNATH ROY BINRAJ *vs.* SHEO
PROSAD SINGH.

40 C.W.N. 165=162 I.C. 234=A.I.R.
1936 Cal. 230.

Letters Patent—(Contd.)

Clause 12—*Revocation of leave if possible on grounds of hardship, humanity or collusion.*

Where an assignment of a promissory note was admittedly for value and not brought about simply for the purpose of embarrassing the defendant and creating jurisdiction and where hardship upon the defendants was not apparent, the note having been executed within the municipal limits of the town of Calcutta although outside the original jurisdiction of the High Court—as also on the principle that any discrimination between the plaintiffs and defendants who are interested in negotiable instruments on the grounds of hardship or humanity or even on the ground of legitimate collusion to assign would effect in striking at the very root of the law of negotiability the contention of the defendants that leave to sue granted under clause 12 of the Letters Patent ought to be revoked, was not given effect to. (*Cunliffe J.*)

RADHIKA MOHAN ROY *vs.* BHABANI
PROSANNA LAHIRI.

63 Cal. 908=40 C.W.N. 717=164 I.C.
904.

Cl. 12—*Leave to sue on the Original Side—jurisdiction of the Court to revoke leave.*

Where on an application by the defendant for the revocation of leave obtained by the plaintiff on the assignment of a promissory note, to sue on the Original Side of the High Court at Calcutta under Cl. 12 of the Letters Patent, it is found that the assignment took place within jurisdiction on the day before the expiry of the period of limitation, that the promissory note had been originally executed by the defendant outside jurisdiction, that the sum at stake was not a large one and there was no likelihood of any issue being made which the local Tribunal would not be competent to try and that the circumstances of assignment suggested collusion for the purpose of creating jurisdiction, *held.* that leave under

Letters Patent—(Contd.)

Cl. 12 was liable to be revoked. 59 Cal. 150 distinguished. (*Pankridge J.*)

KALOORAM AGARWALLA vs. JONISTHA CHAKRAVARTY.

63 Cal. 435 = 40 C.W.N. 161 = 163 I.C. 167 = A.I.R. 1936 Cal. 349.

Cl. 12—Revocation of leave—defendant's residence and nature of transaction how far to be taken into account in granting or refusing leave.

When people take an assignment of a pronote they should be prepared to enforce their claim either in the Court within whose jurisdiction the maker resides or in a jurisdiction where a part of the cause of action with which the makers are directly concerned has arisen. Therefore, where the defendants who were landholders in District Monghyr had borrowed money and purchased commodities for personal use from a trading firm of the locality and on an adjustment of the account gave a promissory note for such debts, and the same was assigned to a person in Bhagalpur who assigned it to a relation of his in Calcutta for valuable consideration, and the latter obtained leave to sue in the Calcutta High Court under cl. 12 of the Letters Patent, held, that leave was liable to be revoked on defendant's application. (*Pankridge J.*)

DAULATRAM RAWATMULL vs. MAHARAJ LAL.

63 Cal. 526 = 40 C.W.N. 164 = 162 I.C. 287 = A.I.R. 1936 Cal. 219.

Cl. 15—Decision in Land Acquisition appeal if judgment within the meaning of the clause.

A Judgement of the High Court in a case under the Land Acquisition Act, 1894 as amended by Act XIX of 1921 is a "judgment" within the meaning of cl. 15 of the Letters Patent. 41 Mad. 943, 16 C.W.N. 961 & 17 C.W.N. 421 distinguished. (*Guko Bartley & R. C. Mitter JJ.*)

COLLECTOR OF DACCA vs. GOLAM AJAM CHOWDHURY & ORS.

40 C.W.N. 1143 = A.I.R. 1936 Cal. 653.

Letters Patent—(Contd.)

Cl. 15—Pronouncement of judge on a special report by an Officer under Chap. 26, r 50, of the Original Side Rules, if a judgment.

The pronouncement of a judge on a special report submitted by an Officer taking a reference under Chap. 26, r. 50 of the Original Side Rules and Orders of the Calcutta High Court is not a judgment within the meaning of cl. 15 of the Letters Patent and is therefore not appealable. (*Derbyshire C. J. & Costello JJ.*)

GANGADHAR BAGLA vs. KANTI CH. MUKHERJEE & ANR.

40 C.W.N. 1264.

Cl. 26—Rule on Advocate General for grant of certificate under cl(26) if competent.

Where an accused, tried by the High Court in its Original Criminal Jurisdiction, on being convicted and sentenced by that Court applies to the High Court for a certificate under Cl. 26 of the Letters Patent in order to have the decision of the trial Court reviewed by the High Court, and the Advocate General, after consideration of the matter refuses to grant the certificate, no rule can issue calling upon him to show cause why he should not grant the certificate. (*Derbyshire C. J. & Costello J.*)

KURT KRUG vs. ADVOCATE GENERAL.

63 Cal. 535.

LETTER PATENTS (LAHORE HIGH COURT)

Cl. 9—Insolvency proceedings, if to be considered as a suit.

The words "suit" in cl. IX of the Letters Patent, Lahore High Court, ought not to be narrowly considered, and it includes a proceeding in insolvency. Therefore the Lahore High Court under its extraordinary powers has jurisdiction to transfer a proceeding in insolvency from a Lower Court to itself for disposal. (*Young C. J. & Monroe J.*)

PEOPLES BANK OF NORTHERN INDIA LTD. vs. HARKISSEN LAL.

17 Lah. 582 = 38 P.L.R. 235 = 160 I.C. 972 = A.I.R. 1936 Lah. 608.

Letters Patent (Lahore)—(Contd.)

Clause 10—*Order directing decree of Sub-judge to be registered as a decree of a Revenue Court, if appealable.*

An order passed by a single Judge holding that the suit, the appeal from which was being heard by him was triable by the Revenue Court and directing the decree of the Subordinate Judge in the suit to be registered as a decree of a Revenue Court is not a judgment within the meaning of Cl. 10, of the Letters Patent of the Lahore High Court and no appeal therefore lies from the said order. (*Addison & Abdul Rashid JJ.*)

TOLARAM SINGH vs. FAZL AHAMAD.

17 Lah. 606=38 P.L.R. 611=A.I.R. 1936 Lah. 785.

Clause 10—*Objection not specifically raised before single Judge if can be raised in appeal.*

An objection not specifically raised in an appeal heard by a single Judge of the High Court cannot be raised in appeal to the Division Bench under Cl. 10, of the Letters Patent of the Lahore High Court. (*Addison & Abdul Rashid JJ.*)

HOSHNAKRAM & ANR. vs. PANJAB NATIONAL BANK LTD.

A.I.R. 1936 Lah. 555

LETTERS PATENT (MADRAS HIGH COURT)

Cl. 15—*Order of single judge excusing delay in filing pauper appeal and admitting it—order refusing to set aside such order, if appealable.*

An order of a single Judge of the High Court condoning the delay in filing a pauper appeal, and admitting the same, is not an order which puts an end to a proceeding but on the contrary enables it to go on and and is therefore not a "judgment", which can be appealed against under Cl. 15 of the Letters Patent. An order of the same judge refusing to set aside the order is also not appealable under that clause. 55 Cal.

Letters Patent (Madras)—(Contd.)

135 relied on. (*Beasley C. J. & Stodart J.*)

ANANTHA NARAYAN AIVER vs. HARICHARAN.

59 Mad. 656=70 M.L.J. 308=1936 M.W.N. 41=43 M.L.W. 310=A.I.R. 1936 Mad. 387=161 I.C. 416.

Cl. 15 (2)—*Decision in second appeal, if open to further appeal—Order refusing to grant leave to appeal, if appealable.*

Neither Sec. 95 nor Sec. 100, C. P. Code will give a person a right of appeal from a decision in a second appeal. Such a decision is not subject to further appeal except in accordance with the 2nd para of Cl. 15 of the Letters Patent, requiring a certificate from the Judge who heard the second appeal to the effect that the case is a fit one for further appeal. An order by a Judge hearing a second appeal refusing leave to further appeal is not appealable, 52 Mad. 953 followed. (*Vardachariar & Stodart JJ.*)

MAGALAM GOVINDA RAO, IN THE MATTER OF.

59 Mad. 293

LETTERS PATENT (RANGOON HIGH COURT)

Cl. 13—*Order directing examination of a person under Sec. 196, Companies Act if appealable.*

An order directing the public examination of a person under Sec. 195, Companies Act is not a judgment within the meaning of cl. 13 of the Letters Patent of the Rangoon High Court, and is therefore not appealable. 13 Rang. 457 followed.

K. B. ROY CHOWDHURY vs. BURMA LOAN BANK, LTD.

14 Rang. 15=161 I.C. 749(1)=A.I.R. 1936 Rang. 166.

LICENSE.

Licenses making use of licensor's land—Licensor terminating their user by notice—Plea of equitable estoppel—Essentials.

License—(Contd.)

In order to raise the plea of equitable estoppel against the owners of certain lands who have terminated by notice the licensee's user of their lands, it is incumbent on the licensee to establish that the conduct of the owners had been sufficient to justify the legal inference that they had by plain implication contracted that the licence would be perpetual. The reference to a contract in the principle as stated does not mean that the real consensus of mind between the parties must be inferred to have existed, but that the conduct of the parties has been such that equity will presume the existence of such a conduct as a matter of plain implication. (*Lord Maugham*)

GUJRAT GINNING & MANUFACTURING CO., LTD., AHMEDABAD vs. MOTILAL HIRALAL SPINNING & MANUFACTURING CO., AHMEDABAD.

63 C.L.J. 160=40 C.W.N. 417=1936 A.L.J. 145=1936 A.W.R. 169=70 M. L.J. 190=38 Bom. L.R. 353=1936 M. =W.N. 314=160 I.C. 637=A.I.R. 1936 P.C. 77.

LIMITATION ACT (IX OF 1908)

Sec. 3—*Plea of limitation in appellate stage if can be rejected where materials to sustain the plea not put before Court in time.*

It is true that the plea of limitation can be urged at any stage having regard to Sec. 3 of the Limitation Act. But when a party does take the appropriate defence but does not put before the Court materials to sustain that defence it is not possible for the appellate Court to give effect to the defence contention and in such circumstances the plea may be rejected, (*D. N. Mitter & Patterson JJ.*)

BEJOY KUMAR BHATTACHARJEE vs. FIRM SATISH CH NUNDY.

A.I.R. 1936 Cal. 382.

Sec. 3—*Plaint allowed to be amended—date on which suit must be deemed to have been held.*

Where an amendment has been allowed by the Court and the plaintiff files his

Limitation Act—(Contd.)

amended plaint within the time allowed, the presentation of the amended plaint relates back to the date of the original presentation of the plaint which has to be taken to be the date of institution of the suit for the purposes of Sec. 3 of the Limitation Act. (*Dunkley J.*)

KRISHNA PROSAD SINGH & ANR. vs. MA AYE & ORS.

14 Rang. 383=165 I.C. 810=A.I.R. 1936 Rang. 508.

Sec. 5—*What constitutes sufficient cause for not preferring appeal within time—plea of sickness when may be availed of.*

A mere plea of sickness in itself unless the effect of the sickness was such that in the circumstances it would afford reasonable excuse for the delay in presenting the appeal, would not justify the Court in exercising its discretion under Sec. 5, Limitation Act. The Court must consider in each case whether the effect of the illness as proved is such as to afford sufficient cause for the failure to present the appeal within the time prescribed by the law. The onus lies upon the applicant to satisfy the Court that he had sufficient cause for not preferring the appeal within time. (*Page C. J & Ba U J.*)

S. M. & ALBY vs. MAUNG SAN NYEIN.

14 Rang. 155=A.I.R. 1936 Rang. 183=162 I.C. 664

Sec. 5—*Time spent in prosecuting application under Sec. 151, C. P. Code, when another remedy open, if can be excluded.*

When a remedy is provided by law, resort to the inherent jurisdiction under Sec. 151, C. P. Code, is not permissible; such an application cannot be said to be a bona-fide one, and the time spent in prosecuting it cannot be deducted under Sec. 5 Limitation Act, in computing the period of limitation for filing an appeal. (*Bhide J.*)

LADHA RAM vs. BARKAT ALI & ORS.

35 P.L.R. 383=A.I.R. 1936 Lah. 672=165 I.C. 661.

Limitation Act—(Contd.)

Sec 5—Delay by copying department in furnishing copies—Plaintiff if entitled to benefit of Sec. 5.

Where the delay in filing an appeal is due to the delay of the copying department in furnishing copies of the judgment and decree, the appellant is entitled to get the benefit of Sec. 5 of the Limitation Act. (*Jailal J.*)

GHULAM RASUL KANAN, vs. ALI BAKHSH.

A.I.R. 1936 Lah. 132 = 161 I.C. 457.

Sec. 5—Appeal wrongly filed in High Court due to vagueness of the wording in the decree—Provisions of the section, if may be applied.

Where a decree as framed by the Lower Court was not very clearly worded, and its exact meaning and significance was not by any means beyond doubt, and the respondent himself was misled in choosing the wrong forum, *held*, that the provisions of Limitation Act was applicable and the period during which the appeal remained pending in the District Court could be excluded. (*Tekchand & Mohammed J.*)

HARILAL vs. KHIZAR HAYAT KHAN.

A.I.R. 1936 Lah. 168 = 161 I.C. 251.

Sec. 5—Plea under the section—decision by the appellate court—High Court, if will interfere with such decision.

If the lower appellate Court, has on an application under Sec. 5, Limitation Act, held that an appeal was time barred or was within time, the High Court in second appeal would not ordinarily go behind that finding and interfere. It is only where the reasoning of the lower appellate Court is based wholly upon an erroneous view of law, or the Court rejects such a plea arbitrarily without exercising judicial discretion, that the High Court would interfere. (*Agha Haidar J.*)

LADHA MAL-BISHEN DAS vs. NADAR.

A.I.R. 1936 Lah. 742

Limitation Act—(Contd.)

Secs. 5 & 14—Appeal to wrong Court under a bonafide mistake—Appeal returned and filed in proper Court after time—Appellant if entitled to extension of time.

A suit was wrongly valued for the purpose of jurisdiction but the defendant acquiesced in the valuation and did not press for framing an issue on the point. The suit having been dismissed, an appeal was preferred to the District Judge who however discovered that the suit had been undervalued, and thereupon returned it for presentation to the Chief Court to which the appeal should have been preferred. By the time the appeal was presented to the Chief Court, the prescribed period of limitation had expired. *Held*, that there being no question of fraud or bad faith, the appellant had sufficient cause within the meaning of Sec. 5, Limitation Act for not preferring the appeal to the Chief Court in time, and was therefore entitled to extension of the period of limitation. (*King C. J. & Zia-Ul-Hosan J.*)

MANRAJ KUAR vs. BASANT RAI.

1936 O.W.N. 325

Sec. 6 & 19—Acknowledgment by debtor during minority of creditor—benefit of Sec. 6, if can be claimed.

Where a written acknowledgment is made by the debtor during the minority of the creditor, the acknowledgment does not merely extend limitation for a period of 3 years, but it operates under Sec. 6 of the Limitation Act, to produce the result that "at the time from which the period of limitation is to be reckoned" the creditors were under the legal disability of being minors and therefore they have all the period for their suit given to them by Sec. 6. (*Bennet J.*)

RAMESH CHANDRA vs. KASHI LAL BHAJAN LAL.

1936 A.L.J. 59 = 1936 A.W.R. 99 =
A.I.R. 1936 All. 152 = 161 I.C. 330.

Sec. 7—Dispute between joint Hindu family and stranger—manager, if can give discharge without concurrence of minor members of the family.

Limitation Act—(Contd.)

In case of a dispute between a joint Hindu Family as a whole on the one side and a stranger on the other the manager as the Karta is competent to represent the whole family, and can give a valid discharge without the concurrence of the minor members; therefore Sec. 7 of the Limitation Act applies to such cases and if time has run out against the manager, limitation is not saved merely because there are some minor members. (*Sulaiman C. J. & Bennet J.*)

ANRUDH RAI & ANR. vs. SANT PROSAD RAI & ORS.

57 Aail 591.

Sec. 10 & Arts 120 & 134—Suit for ejectment of mortgagees of endowed property more than six years after date of mortgage—limitation.

A suit for ejectment against the mortgagees of property dedicated to an endowment, is governed by Art. 120, Limitation Act, and is barred, if brought more than six years after the date of the mortgages. Such a suit cannot come under Sec. 10 of the Act, as that section excludes assignees for consideration. Nor does it come under Art. 134, as a Hindu religious endowment does not constitute a trust within the meaning of the Article and as the suit is not for possession, but merely for ejectment. (*Coldstream & Bhide JJ.*)

DWARKA DAS vs. BIKHI RAM.

A.I.R. 1936 Lah. 784 = 105 I.C. 48.

Sec. 12—Time requisite for obtaining copy of decree appealed from—Meaning of.

The words "Time requisite for obtaining a copy of the decree appealed from" in Sec. 12, Limitation Act means the time which would have been necessary in any case for obtaining the copy of the decree appealed from. No period which may be under the control of the appellant between the date upon which the judgment is pronounced and the date upon which the appeal was filed can be considered as the time requisite within the meaning of Sec. 12, Limitation

Limitation Act—(Contd.)

Act. Where therefore a judgment was delivered on the 6th December but the decree was not signed until the 13th and the copy of the decree was delivered to the appellant on the 15th held, that as the period between the 5th and the 15th of December was not under the control of the appellant, it was liable to be excluded in computing the period of limitation. 55 I. A. 161 relied on; 62 I. C. 649 overruled. (*Courtney Terrel, C. J., Wort, Macpherson, Mohammad Noor, Dhavle, Agarwalla and Varma JJ.*)

GABRIEL CHRISTIAN vs. CHANDRA MOHAN MISSIR & ANR.

15 Pat. 284 = 16 P.L.J. 849.

Sec. 12—Time spent in ascertaining costs of preparing copies, if time "requisite" for obtaining copies.

Under the rules for the supply of copies, the time necessary for ascertaining the costs of preparing the copy is time requisite for obtaining copy within the meaning of Sec. 12 of the Indian Limitation Act, and an applicant is entitled to exclude from the prescribed period of limitation the period between the date of presentation of the application and the date on or by which the full costs of preparing the required copy is deposited, provided he deposits with reasonable diligence the aforesaid amounts as and when required by the copying department, and provided further that in the case of an application made by post, he remits Rs. 5 with the application. (*Monroe, Bhide & Currie JJ.*)

KISHOR CHAND vs. BAHADUR ETC.

17 Lah. 429 = 38 P.L.R. 493 = A.I.R. 1936 Lah. 771.

Sec. 12—Appellant taking copy of decree twice—extension of time cannot be granted on the basis of time taken to obtain the latter copy even if that copy is filed with the memo of appeal.

The time requisite for obtaining a copy is the shortest time during which a copy

Limitation Act—(Contd.)

could have been obtained by the appellant and it has nothing to do with the amount of time spent by him in obtaining the copy which he chooses to file with the memorandum of appeal. So if an appellant twice takes copies of the decree against which he prefers his appeal, the time taken for obtaining the first copy shall be considered to decide limitations. (*Dalip Singh & Beckett JJ.*)

MATHNLA & ORS. vs. SHER MOHAMMED & ORS.

38 P.L.R. 1054.

Sec. 12—Application for copy of judgment; and decree—decree not ready—no demand made for deposit for copy of decree—deposit not made—delay in filing appeal, if excusable.

The appellant applied on 29. 8. 33 for copies of the judgment and decree in a suit disposed of on 28. 8. 33. On 1. 9. 33, the appellant paid Rs. 7-12- demanded from him and remained under the impression that the amount was for both judgment and decrees. On the decree not being furnished to him along with the judgment, he made enquiries and learnt that the decree had not been signed and the amount deposited by him on, 1. 9. 33 was for judgment only. Later, on 19. 9. 33, he deposited the sum of 13- and obtained a copy of the decree. On 26. 10. 33, he filed an appeal which was dismissed as being barred by limitation. Held, that the appeal was not barred, as the appellant was entitled to exclude the time between 29. 8. 33, & 19. 9. 33, under Sec. 12 of the Limitation Act. Even if that section was inapplicable, the case was eminently one in which the delay could be condoned under Sec. 5 of the Limitation Act. (*Tek Chand & Dalip Singh JJ.*)

ABDUL GHANI vs. MAULA BAKSH.
38 P.L.R. 852=161 L.C. 215=A.I.R.
Lah 670.

Sec. 12—Application for copy by post—assessments paid in as and when prepared and submitted by office—whole time if may be excluded.

Limitation Act—(Contd.)

When a party applies for copy by post in accordance with rules and pays the initial cost with application, and other costs when estimates are prepared, the whole period from application to the obtaining of copies has to be excluded in computing the period of limitation, and not the period from the date of assessment of cost to the date when the copy is ready. (*Addison & Rashid JJ.*)

MEHTAB ALI vs. DIN MAHAMMAD.

17 Lah. 574=39 P.L.R. 1050.

Sec. (2)—Application not accompanied with full costs of preparing copies, if valid application.

An application for a copy whether made in person or by post which bears necessary court fee stamp and is addressed to the proper officer is a valid application even if it is not accompanied by the full costs required for preparing and certifying the copy. (*Monroe, Bhide & Currie JJ.*)

KISHOR CHAND vs. BAHADUR ETC.

17 Lah. 429=38 P.L.R. 493=A.I.R.
1936 Lah. 77(F.R.)

Sec. 12 (3)—Time requisite for obtaining copy of Judgment if must be executed in calculating limitation for an appeal to the Privy Council.

It is necessary on an application for leave to appeal to His Majesty in Council that a copy of the judgment from which it is sought to appeal should be before the Court. Therefore, the time requisite for obtaining a copy of the judgment should be excluded from the 90 days within which the application must be presented. (*Page C. J & Sen J.*)

R. K. BANERJEE vs. ALAGAMMA ACHI.

13 Rang. 762.

Sec. 14—Application of the section—Good faith—Meaning of.

To attract the application of Sec. 14, Limitation Act, the appeal must have been presented in good faith in a wrong Court.

Limitation Act—(Contd.)

But nothing can be said to be done in good faith which is done without due care and attention. Where a suit was valued for the purpose of jurisdiction at Rs. 20,000, there is no excuse for filing an appeal in the Court of the District Judge. If an appeal is so filed it cannot be said to have been filed in good faith. (*Addison & Din Mohammed JJ.*)

FEROZE DIN vs. GOPAL DAS.

38 P.L.R. 311.

Sec. 14—Withdrawal of suit under Or. 23, r. 1 C. P. Code—subsequent suit on same cause of action—benefit of Sec. 14, if can be claimed.

Where a plaintiff chooses to withdraw his suit under Or. 23, r. 1. C. P. Code, he is not entitled to the benefit of Sec. 14, Limitation Act, in a subsequent suit founded on the same cause of action, because it can not be considered that the previous suit failed on account of a defect of jurisdiction or other cause of a like nature. (*Suleman C. J. & Bajpai J.*)

RAMMANOHAR vs. BABU SINGH.

1936 A.W.R. 1014.

Sec. 14—Decree-holder plaintiff, if entitled to deduction of time occupied by previous execution proceedings wherein same matter agitated on objection by judgment-debtor.

When on execution proceedings being started by the decree-holder objection there-to is raised by the judgment-debtor under Sec. 47, C. P. Code, the decree-holder in resisting such objection, is not in the position of a defendant or opposite party but in the position of a plaintiff or applicant within the meaning of Sec. 14 of the Limitation Act. Accordingly, in a subsequent suit brought by the decree-holder in regard to the subject matter of the objection, he is entitled under Sec. 14 to a deduction of the whole period occupied by the execution proceedings from their institution up to the decision of the final court of appeal. 39

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Limitation Act—(Contd.)

C. W. N. 966 overruled. (*Guho & Bartley JJ.*)

**ABDUL SATTAR CHOWDHURY & ORS
ABDUL RUSAN & ORS.**

40 C.W.N. 914=165 I.C. 756=A.I.R. 1936 Cal 400.

Sec. 17—Death of person leaving competent legal representative—accrual of right of action some time later—limitation, if runs from death or from accrual of right.

Sec 17 of the Limitation Act does not accelerate the right of action. When a right of action in favour of a person does not accrue till some time after his death but there is, at his death, a competent legal representative, Sec. 17 has not the effect of causing the right to accrue and time to run from the death of such person and of thus abridging the limitation. Time will run from the date when the right of action accrues. (*Lord Maugham*)

MURUGESAM PILLAI vs. MINAKSHI-SUNDARA AMMAL.

63 I.A. 429=41 C.W.N. 22=38 Bom L.R. 1233=71 M.L.J. 831=44 M.L.W. 579=71 P.L.J. 914=1936 O.W.N. 851=164 I.C. 337=A.I.R. 1936 P.C. 309.

Sec. 19 Acknowledgment of liability—what amounts to.

There is a clear distinction between addressing acknowledgment of liability to a person and acknowledging liability to a person. In order to bring his case within limitation, the person who attempts to enforce his right must show that the acknowledgment of liability was in his favour though it need not have been addressed to him, as acknowledgment of liability to the person who is claiming relief may be addressed to another person. (*Jai Lal J.*)

ISHAR SINGH vs. SADHU SINGH.

38 P.L.R. 855=A.I.R. 1936 Lah. 859=165 I.C. 74.

Sec. 19—Agent authorised by power of attorney to look after case work of an estate

Limitation Act—(Contd.)

if can acknowledge liability under the section.

Where a power of attorney executed in favour of an agent only authorised him to look after the case work connected with the estate but in fact he was authorised to issue cheques on his own responsibility, it cannot be said that the agent had power to acknowledge liability within the meaning of Sec. 19, Limitation Act. Such liability can only be fastened upon the principal by a person authorised in this behalf, that is to say, who has been given authority to make such an acknowledgment of a liability. (*Nanavutty J*)

DEPUTY COMMISSIONER, KHERI *vs.* JAGDAMBA PROSAD.

1936 O.W.N. 827 = 162 I.C. 448 = A.I.R. 1936 Oudh 332.

Sec. 19—*Letters written by authorised agent giving assurances to settle account if amounts to acknowledgment.*

Letters proved to be in the handwriting of the Assistant Manager or Manager of the estate of the defendant in a mortgage suit, forming part of the correspondence between the parties relating to the payment of loan and containing assurances for settlement of the transaction constitute valid acknowledgment of liability within the meaning of Sec. 19, Limitation Act. (*Srivastava & Nanavutty JJ.*)

BHOLANATH *vs.* MAHRANI KURR.

1936 O.W.N. 489 = 162 I.C. 365 = A.I.R. 1936 Oudh 280.

Sec. 19—*Estate under management of Court of Wards—Letter by Deputy Commissioner to creditor of estate admitting his claim—Postcard communicating to creditor Board of Revenue's acceptance of his claim—acknowledgment of liability, if any,*

Where a letter signed by an officer acting as special manager of the Court of Wards addressed to the creditor of the estate under the Court of Wards admitted the creditor's claim subject to confirmation by the Board of Revenue and the letter was followed by a postcard sent under the

Limitation Act—(Contd.)

orders of the special manager admitting the claim of the creditor, held, that the letter and the postcard tacked together constituted an acknowledgment of the creditor's claim by duly authorised agents of the debtor within the meaning of Sec. 19, Limitation Act. (*Srivastava A. C. J. & Smith J.*)

SUKHNANDAN PROSAD SURLA *vs.* AHMED ALI KHAN.

1936 O.W.N. 997 = 165 I.C. 269.

Sec. 19—*Promise to renew a debt in writing, if acknowledgment.*

A letter whereby a debtor consents to renew a promissory note is an acknowledgment in writing within the meaning of Sec. 19 of the Limitation Act. (*Panckridge J.*)

BANGSHIDHAR GOPALKA *vs.* A. C. BANERJEE & CO.

40 C.W.N. 130.

Sec. 19—*Acknowledgment—subsisting liability under mortgage deed—Claim for personal decree, if barred.*

If any acknowledgment of liability within the meaning of Sec. 19, Limitation Act, is made within six years of the date of payment of interest under the mortgage deed and also within 6 years of the date of the institution of the suit, the claim for a personal decree is within time. (*Srivastava & Nanavutty JJ.*)

BHOLANATH *vs.* MAHRANI KURR.

1936 O.W.N. 489 = 162 I.C. 362 = A.I.R. 1936 Oudh 280.

Sec. 19—*Debtor conveying immovable property to creditor by unregistered document in part payment of his debt—document if can be relied upon as acknowledgment and part payment of liability, for saving limitation for a suit on the promote.*

A debtor owing money on a promote conveyed certain immovable property to his creditor by an unregistered document

Limitation Act—(Contd.)

in part payment of his debt. In a suit to recover the balance of the debt, the document of sale was relied upon to save limitation. *Held*, that although the document being unregistered could not be relied upon by the creditor to prove his title to the immovable property purchased, it could be relied upon to serve as an acknowledgment and part payment of the debtor's liability to save limitation of the pronote under Sec. 19, Limitation Act. (*Jai Lal J.*)

SHANTI LAL vs. LYALLPUR BANK. LTD.

A.I.R. 1936 Lah. 276 = 162 I.C. 806.

Sec. 19—*Limitation for suit on original consideration, if saved by promissory note subsequently executed and deficiently stamped.*

Limitation for a suit based on the original consideration cannot be saved by putting in a subsequently executed but deficiently stamped promissory note as an acknowledgment of the debt. (*R. C. Mitter J.*)

JOGENDRA CHANDRA BANERJEE vs. SACHINDRA KUMAR SEAL.

63 Cal. 813 = 40 C.W.N. 399.

Secs. 19 & 20—*Acknowledgement by mortgagor of liability under first mortgage, if binds a mortgagee who derives title prior to the acknowledgment.*

Where there is an acknowledgment by a mortgagor of his liability under the first mortgage, that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it cannot bind the mortgagee who derives title prior to the acknowledgment. 41 All. 111 relied on. (*Sulaiman C. J. & Bennet J.*)

RAM SWARUP vs. SAHU BHAGABATI PRASAD

1936 A.W.R. 516 = 1936 A.L.J. 586 = 164 I.C. 725 = A.I.R. 1936 All. 686

Secs. 20 & 21 (2)—*Joint Mortgage—payment by one—Limitation against others if saved.*

Limitation Act—(Contd.)

On 3rd Sep^r, 1910, G & E on behalf of the joint family took a loan from S on the security of family property. On 20th June 1917, G made a payment of Rs. 200 towards interest and endorsed the same over his signature on the mortgage bond. On the 22nd June 1923, G made another similar payment at which time however the family had ceased to be joint. S was not aware of that fact. In a suit for enforcing the mortgage, *held*, that where the debt is a single debt and the liability is one and indivisible the case falls within Sec. 20 and is not taken out of the operation by Sec. 21 (2) of the Act, so that any person interested in the equity of redemption may by making payment in the manner provided by Sec. 20, keep the mortgage alive in such a manner that the whole of the mortgaged property remains liable for the debt. (*James J.*)

SRIPATI SRIMANTA vs. LALJI SAHU.

A.I.R. 1936 Pat. 361 = 163 I.C. 806.

Sec. 21 (2)—*Acknowledgment of liabilities by some only of the heirs of a mortgagor whether operates to save limitation as against the other heirs.*

The proper interpretation to put on Sec. 21, (2), Limitation Act, is, that if at the time when the acknowledgment is made or the payment is made there are more than one person in existence who stand in relationship to each other as joint Contractors, partners, executors, or mortgagors, then the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others. Accordingly an acknowledgment of liability by some only of the heirs of a mortgagor against whom a decree for sale has been passed, does not operate to save limitation as against the other heirs of the mortgagor as well as the makers of the acknowledgment. 41 All. 111 overruled (*Sulaiman C. J., Rakhpai Singh & Aisopp JJ*)

MUHAMMED TAQI KHAN vs. RAJARAM.

1936 A.W.R. 996 = 1936 A.L.J. 1140 = A.I.R. 1936 All. 520.

Limitation Act—(Contd.)

Sec. 21. (3)—Acknowledgment by widow before amendment in 1927—Right of suit barred before amendment—acknowledgment if can be relied upon in suit instituted after amendment.

Under the law of limitation as it stood prior to the amendment of the Limitation Act in 1927, a widow having a life estate was not competent to give an acknowledgment which would bind the reversioners. In 1927, the Limitation Act was amended so as to render such an acknowledgment binding on the reversioner. Where however the acknowledgment by the widow was made before the amendment of 1927 and the right of suit have become barred under the law as it stood before the amendment, the acknowledgment cannot be relied upon in a suit instituted after the amendment came into force. (*Rachhpal & Collister JJ.*)

TEJ BAHADUR vs. FIRM RADHA KISSEN, GOPI KISSEN.

1936 A.W.R. 1044 = 1936 A.L.J. 1373
= A.I.R. 1936 All. 858.

Sec. 22—Omission to record all partners as defendants—Effect of.

In the original suit the plaintiff named four dissolved firms as defendants but on certain objections having been taken to the maintainability of the suit against two of the firms obtained leave to amend the plaint and in the amended plaint, he recorded only two of the partners as defendants. An objection was taken that the appeal was barred by time. But the plaintiff claimed extension of time on the ground that it was a case of misdescription. *Held*, that the omission of two of the defendants amounted to not naming the defendants and not misdescription under Sec. 22, Limitation Act and the plaintiff therefore could not take the protection afforded by that section. (*Addison & Abdul Rashid JJ.*)

AMRIK SINGH vs. SANT SINGH.

38 P.L.R. 827 = A.I.R. 1936 Lah. 485 = 163 I.C. 734.

Sec. 23—Test for deciding whether a cause of action constitutes a "continuing wrong."

Limitation Act—(Contd.)

In order to constitute a "continuing wrong" there must be not a single wrongful Act from which injurious consequences follow, but a state of affairs, every moment's continuance of which is a new tort. Further, the person who intentionally produces the state of affairs must be regarded as intentionally causing it to continue, though in a position to terminate it at his pleasure. (*Curgenven & King JJ.*)

PONNU NADAR vs. KUMARU REDDIAR.

59 Mad. 75 = 161 I.C. 653.

Sec. 23—Application for execution of an injunction decree restraining the building of a house so as to obstruct light and air—limitation.

A obtained an injunction against B restraining him from building his house in such a way as to obstruct light and air to A's house. B, having built in contravention of the injunction, A applied for the execution of the decree. The application was resisted on the ground that it was timebarred, having been made more than three years after the house was completed. *Held*, that the breach was a continuing breach within the meaning of Sec. 23, Limitation Act, and therefore no limitation period under the Limitation Act applied; a fresh time started running every day the wrong continued. 6 Cal. 694, I.C. W. N. 96 & 21 C. L. J. 649 followed. (*Young C. J. & Monroe J.*)

MOTI RAM vs. HANS RAJ & ORS.

A.I.R. 1936 Lah. 324 = 162 I.C. 303.

Sec. 26—Right to go upon another's land for repairing one's own premises, if may be acquired as an easement under the Section.

A right to go upon another's land for the purpose of repairing of wall or a house 'and in other discontinuous easement' can be required under Sec. 26 of the Indian Limitation Act, and if the evidence is that the user was open and as of right as and when occasion arose, it is sufficient for the acquisition of right under the statute, the fact that each user was at long intervals

Limitation Act—(Contd.)

being of no moment. 7 Cal. 192 followed.
(*R. C. Mitter J.*)

MANGULAL AGARWALA vs. CHANDI CHARAN MUKHERJEE.

40 C.W.N. 222.

Sch. I. Arts. 7 & 102—Suit for wages by a motor driver who is a whole time servant—limitation

A motor driver, especially one who is provided with board and lodging by his employer and is liable to be called upon at any time during the day or the night to drive the motor car for his employer according to his reasonable requirements, is a household servant within the meaning of Art 7 of the Limitation Act. Therefore a suit by such a motor driver, for wages is governed by that Article and not by Art 102, which is a residuary Article applicable only where Article 7 has no application. (*Jai Dal J.*)

SITA RAM vs. JAGANNATH SINGH.

38 P.L.R. 596=160 I.C. 1042=A.I.R. 1936 Lah. 661.

Art 14—Application for redemption consigned to record room—subsequent application after a year, if maintainable,

Where a mortgagor withdrew from proceedings for redemption of a mortgage and a revenue officer concerned without passing any order on merits consigned the records to the record room and thereafter another application for redemption was filed and it was contended that the subsequent application being filed after the expiry of a year from such order was barred by limitation. *Held*, that the application was not barred because the previous order not having been passed on merits, Art. 14, Limitation Act, did not apply to the case. (*Agha Haidar J.*)

ALI MOHAMMED vs. SHAH TAMAS KHAN.

38 P.L.R. 917=165 I.C. 739=A.I.R. 1936 Lah. 692.

Arts. 22 & 120—Defendant enticing away plaintiff's wife—Suit for damages—Limitation.

Limitation Act—(Contd.)

A suit for damages against a person for enticing away the plaintiff's wife is governed by the general Art. 120 of the Limitation Act, and not by Art 22 of the Act which applies to a case of injury to the person of the plaintiff. (*Sullaiman C. J. & Bennet J.*)

SOBHARAM vs. TIKARAM.

1936 A.L.J. 574=1936 A.W.R. 515=
136 I.C. 974=A.I.R. 1936 AH. 454.

Art. 23—Suit for compensation for malicious prosecution—date from which limitation runs.

Under Act. 23 of the Limitation Act, the limitation for filing a suit for malicious prosecution is one year from the date of the acquittal in a criminal prosecution. The fact that an application for revision against the order of acquittal is filed would not give a fresh period of limitation for bringing the suit for damages from the date of the dismissal of the application for revision. (*Nanavutty J.*)

SHANKER PRASAD vs. SHEO NARHIN

11 Luck. 237.

Art. 24—Suit for damages for libel contained in report of President of Union Bench to S. D. O.—Limitation.

The plaintiff sued for damages for an alleged libel made by the President of a Union Bench in a report made by him to the Subdivisional magistrate. The suit was brought within one year from the date of the report.

Held, that the suit was not barred by limitation. (*M. C. Ghosh J.*)

HEMCHANDRA ROY CHOWDHURY vs. TARAPADA SANJAL.

40 C.W.N. 500.

Art. 36—Tenant using water from a tank for a purpose different from what was agreed to by landlord claim by landlord for damages—limitation.

Under the terms of a muchilika executed by a landlord in favour of his tenant, the tenant was permitted to raise second crop

Limitation Act—(Contd.)

on lands fit for the second crop and pay half assessment therefore, and to utilise the tank water only for the said purpose, and for no other purpose. The tenant having taken water not for the second crop but for the purpose of watering the field to facilitate ploughing for the next season, the landlord on 25-3-1929 sued for damages for wrongful use of the water on 23-3-1926. *Held*, that the suit was barred by limitation under Art 36 of the Limitation Act which governed the case. (*Venkataramana Rao J.*)

MANGA REDDI vs VENKATARAGHAVA AYYANGAR.

70 M.L.J. 255 = 43 M.L.W. 429 = 1936 M.W.N. 196 = 161 I.C. 535 = A.I.R. 1936 Mad. 250.

Art. 44—Suit by minor to set aside alienations made by his mother as guardian, when barred.

There were two undivided cousins, and at a time when both of them were minors, their mothers acting as guardians alienated certain properties belonging to them. After the death of one of the minors, a suit was brought by the surviving minor to recover the property from the alienes on the ground that the alienation was beyond the power of the guardians to make. The suit was instituted within 12 years of the alienation, but more than three years after the plaintiff attained majority. *Held*, that the suit was barred by Art. 44 of the Limitation Act. 30 Bom. 152; 40 M. L. J. 475; and 34 M. L. J. 229 referred to.

ANKAMMA vs. KAMESWARAMMA.

59 Mad. 549 = 70 M.L.J. 352 = 23 M. L.W. 611 = 1936 M.W.N. 74 = 161 I.C. 797 = A.I.R. 1936 Mad. 346.

Art. 44—Suit to avoid partition effected during minority of plaintiff—Limitation.

A partition of a property is a transfer within the meaning of Art. 44, Limitation Act. Therefore a suit for a declaration that the plaintiff is not bound by a partition

Limitation Act—(Contd.)

effected during his infancy by his guardian must be brought within three years from the date of his attaining majority. 54 I.C. 146 dissented from; 72 I.C. 978 & 97 I.C. 70 followed. (*Becket J.*)

SADHURAM vs. PRITHI SINGH.

38 P.L.R. 201 = 161 I.C. 861 = A.I.R. 1936 Lah. 220.

Arts. 44 & 142—Alienation of minor's property by person alleging himself to be guardian, but who is neither de jure, nor natural, nor defacto guardian suit to set aside such alienation—limitation.

An alienation of a minor's property by a person who is neither *de facto* nor *de jure* guardian of the minor is void and not voidable. Such an alienation can be ignored by the minor and he can bring a suit to set aside the same within twelve years of his attaining majority. Art 44, Limitation Act, does not apply to such an unauthorised alienation. (*Menon J.*)

PONNAMMAL vs. GOMATHI AMMAL.

71 M.L.J. 396 = 44 M.L.W. 543 = 1936 M.W.N. 1032 = A.I.R. 1936 Mad. 554 = 165 I.C. 267.

Art. 47—Applicability of the Article—essential requirements.

Art. 47, Limitation Act, read with Sec. 145, Cr. P. Code, makes it clear that the Article applies only to those cases in which the magistrate has declared one of the parties to be entitled to possession until evicted therefrom in due course of law or has restored possession to a party found to have been forcibly and wrongfully dispossessed within two months of his initial order. Therefore, the essential requirements for the application of the Article, is the order of the Magistrate in respect of possession of the property. When that is wanting, Art. 47 has no application. (*Srivastava & Nanavutty JJ.*)

PARTAB BAHADUR SINGH vs. JAGAT-JIT SINGH.

1936 O.W.N. 714 = 164 I.C. 118 = A.I.R. 1936 Oudh 357.

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Art. 47—Order under Sec. 145, Cr. P. Code—plaintiff holding mortgage prior to that order—plaintiff suing for possession—Art. 47, applicable.

The words "claiming under such person" in Art. 47, Limitation Act, refer to those persons who claim from the person bound by the order under a title created subsequent to the order and not those who claim under a title created prior to the order. Therefore, a person who sues for recovery of a land on the basis of a simple mortgage of a date prior to the passing of an order under Sec. 145 Cr. P. Code in respect of the land, cannot be said to be a person bound by the order and Art. 47, Limitation Act, is not applicable to such a case. (*Raja Mohammed Noor & Rowland JJ.*)

MUNGA LAL vs. SAGARMAL & ORS.

15 Pat. 481 = 17 P.L.T. 726 = A.I.R. 1933 Pat. 629.

Art 47—Dispute between trustee and third person—Order by Magistrate under Sec. 145 Cr. P. Code—Article, if applicable.

It is not correct to say that Art 47, Limitation Act should not be applied to trust properties. Sec. 145, Cr. P. Code relates to the question of possession of immovable property, and its application does not depend upon whether the claim is made by a private owner or on behalf of a trust. If there is a bonafide dispute between a trustee and a third person, and the other conditions of the section are satisfied, there is no reason why it should not fall within the cognisance of the Magistrate under Sec. 145; nor is there any reason why to an order passed by a Magistrate in such a case, Art. 47 should not be applied. (*Varadachariar & Stodart JJ.*)

JAGATHAMBAL ANNI vs. PERIATHAMBI NADAR.

70 M.L.J. 441 = A.I.R. 1936 Mad. 188 = 1936 M.W.N. 457 = 43 M.L.W. 496 = 161 I.C. 234

Art. 48—Suit for compensation for wrongfully taking coal brought more than

Limitation Act—(Contd.)

three years after the taking away of the coal—Mistaken belief on the part of the plaintiff that the property removed was not his, if can save limitation.

Where a person knew of the encroachment and removal of coal from a certain land long before three years from the date of institution of the suit, the fact that the person did not know that the area from which coal was being removed was his, will be of no advantage to him and will not save the suit from being barred by limitation. The knowledge referred to in Art. 48 of the Limitation Act is the knowledge of the taking away of the property. A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation, unless, of course, the knowledge of the fact was kept from him by the fraudulent conduct of the defendant. 8 Pat. 516 & 57 Cal. 1341 followed. (*Courtney Terrel, C. J. & Mohammed Noor J.*)

SRISH CH. NUNDY vs. RAMJI BECHAN DASS.

A.I.R. 1936 Pat. 179 = 161 I.C. 555.

Art. 54—Provisions of the Article, when applicable.

For Art 54 of the Limitation Act to apply, it must be alleged that the promises were not executed as promised. If the defendants wish to make this allegation, it is for them to make it in their written statement or their pleadings clearly and without any attempt to mislead the plaintiffs (*Tek Chand & Dalip Singh JJ.*)

NORTHERN FOREST CO. vs. RAM SINGH KABULI & Co.

A.I.R. 1936 Lah. 328 = 162 I.C. 302.

Arts. 59 & 60—Money deposited with banker and payable on demand—limitation.

A suit for the recovery of money deposited with a banker and repayable on demand is governed by Art 60 and not Art. 59 of the Limitation Act. 29 All. 773, 37 All. 292, 39 Mad. 1081, 16 Cal. 25 & 15

Limitation Act—(Contd.)

Lab. 242, followed. (*Additson & Abdul Raschid JJ.*)

KANTI CH. MUKHERJEE vs. RADRI DAS.

17 Lab. 481 = 38 P.L.R. 1025 = A.I.R. 1936 Lah. 718 = 165 I.C. 699.

Art. 60—Payable on demand, proof of.

The condition as regards a sum being payable on demand may be implied from the course of dealings between the parties and other circumstances of the case. On the finding that there is a deposit, an implied agreement to repay on demand must be presumed. (*Agha Haidar J.*)

RAM RAKHAMAL vs. HAR NARAIN RAM CHAND.

38 P.L.R. 506 = 164 I.C. 50 = A.I.R. 1936 Lah. 587.

Art. 60—Jama, meaning of.

The word "Jama" as used by Indian Bankers means a deposit and nothing more. Thus where a document speaks of certain money being put in a firm as jama, the money must be deemed to be a deposit and not a loan. (*Agha Haidar J.*)

RAM RAKHAMAL vs. HAR NARAIN RAM CHAND.

38 P.L.R. 506 = 164 I.C. 50 = A.I.R. 1936 Lah. 587.

Arts 60, 66 & 115—Deposit for a fixed period—Article applicable.

Where a deposit of money is made for a fixed period, the money is payable at the specified time, viz. at the expiry of that fixed period. A suit for recovery of the money is governed not by Art. 60 of the Limitation Act, but either by Art. 66 or by Art. 115 of the Act. 37 All. 292 & 37 Mad. 175 referred to. (*Mosely & Ba U JJ.*)

I. S. SEEMA vs. R. K. BANERJEE.

A.I.R. 1936 Rang. 336 = 164 I.C. 412.

Limitation Act—(Contd.)**Arts 62, 116 & 120—Recovery of money under Sec. 68, T. P. Act.**

In a suit for recovery of money under Sec. 68, T. P. Act, limitation is governed by Art. 116 or Art. 120 of the Limitation Act and not by Art. 62 of that Act. 3 Rang. 60 followed. (*Mosely & Ba U. JJ.*)

MA PWA THEIN vs. MA ME THA.

A.I.R. 1936 Rang. 50 = 164 I.C. 461.

Art. 64—Endorsement on back of promissory note that certain amount is due by debtor—suit for recovery of the amount—limitation.

Where on settlement of an account in respect of a debt on a promissory note a certain amount was found due, and an endorsement to that effect was made on the back of the promissory note and was signed by the debtor, held, that the endorsement amounted to an account between the parties, and a suit for recovery of the amount alleged to be due was governed by Art. 64 of the Limitation Act. Such a suit could not be said to be one based on the promissory note and the cause of action for the arose on the settlement of the accounts as shown by the endorsement. (*R. C. Mitter J.*)

PROSONNO KUMAR MOZUMDAR vs. TRIPURA CH. CHOWDHURY.

A.I.R. 1936 Cal. 470

Art. 75—Instalment bond—Whole amount becoming due on failure of payment of any instalment—Creditor if may waive one default and take advantage of another.

Ordinarily a condition in a bond that the whole amount shall become payable on default in the payment of any instalment by the debtor is for the benefit of the creditor, and it is open to him to waive any default and take advantage of a subsequent default. (*Jailal J.*)

KUNDAN LALL vs. INDAR SINGH

38 P.L.R. 266 = 163 I.C. 165.

Art. 75—Suit on instalment bond—default in payment of instalment obligee

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waiving his right to sue for the whole amount - effect of.

In a suit on an instalment bond where the obligee is given the right to sue for the whole amount on the occurrence of default in payment of any instalment it is open to him to waive the benefit of the provision on the occurrence of default in payment of an instalment and yet to avail himself of that provision when a similar default takes place in the payment of a subsequent instalment provided the claim is within time. What amounts to waiver must depend upon the circumstances of each case. A creditor is not adduced affirmative evidence in support of waiver. (*Srinastava A. C. J.*)

JAGAT JIT SINGH vs. MANODAT.

1936 O.W.N. 665 = 164 I.C. 431 = A.I.R. 1936 Oudh. 384.

Art. 75 - Instalment bond - default clause - several instalments barred - creditors suing on default of the last three instalments - whole amount of bond, if recoverable.

An instalment bond provided for payment of the amount by monthly instalments, and it was stipulated that if default was made in the payment of three consecutive instalments, the creditor would be entitled at his option to sue for the recovery of the instalments in respect of which default was made or for the whole of the remaining balance due under the bond. Default was made by the debtor in the payment of several instalments and it was made more than 3 years prior to the institution of the suit. The creditor took no action on that default and allowed several instalments to become barred by time. But taking advantage of the default in respect of the last three consecutive instalments which default took place within 3 years of the institution of the suit the creditor filed a suit for recovery of those three instalments and also of the whole of the amount that remained due under the bond. It was contended that the suit was barred by time. *Held*, that it was open to the plaintiff to sue for the recovery those instalments in respect of which default had taken place within three years of the suit and taking

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advantage of the default in payment thereof to recover the whole of the balance due under the bond even if he had allowed a suit for recovery of instalments in respect of which default had been made previously to become barred by time. (*Jailal J.*)

GODAR SHAH vs. FAZL ILLAHI.

38 P.L.J. 357 = 164 I.C. 59 = A.I.R. 1936 Lah. 570.

Art. 80 - Bond stipulating repayment within fixed period - Creditor given right to sue on non-payment of interest - Date from which limitation begins to run.

Where a bond contained a promise to repay the loan in two years and provided that the interest on the loan would be paid month by month and that in case of non-payment of the interest monthly, the creditor would have a right to sue for his money within or after the stipulated period, held that the cause of action accrued on default of payment of interest and limitation began to run from the date of the first default under Art. 80, Limitation Act, Art. 66, Limitation Act did not apply to the case as the bond was not one in which a date was specified for payment. (*Srinastava & Nanavutty JJ.*)

SIVANARAYANA vs. BADAL.

1936 O.W.N. 515 = 162 I.C. 459 = A.I.R. 1936 Oudh. 279.

Art. 83 - Vendor and Purchaser - third party indemnifying purchaser by executing a Promissory Note in favour of Vendor - suit by third party against purchaser for money paid by him to Vendor - Limitation.

Where A takes up a liability of B due to C at the request of B, and A is compelled to pay C, then A can sue B for the amount paid by him to C, and limitation would run from the date when A made the actual payment, and in that case, Art. 83 would be the proper article applicable. 57 I. A. 1 = 5 Luck 1 (P.C.) followed. (*Varadachariar J.*)

RANGAPPA vs. VENKATASWAMI.

70 M.L.J. 537 = 43 M.L.W. 503 = 1936 M.W.N. 422 = 163 I.C. 177 = A.I.R. 1936 Mad. 334.

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Art. 85—*Transaction when discloses a case of mutual open and current account.*

In order that a transaction should disclose a case of mutual open and current account within the meaning of Art. 85 of the Limitation Act there must be reciprocal demands involving transactions on each side creating independent obligation on either side and not merely transactions which create obligation on one side, that is, on the other being merely complete or partial discharges of such obligation, 34 C. W. N. 1175 followed. (*D. N. Mitter Patterson J.*)

BEJOY KUMAR BHATTACHARJEE vs. FIRM SATISH CH. NUNDY & ORS

A.I.R. 1936 Cal. 352.

Arts. 89 & 120—*Suit between two co-sharers for share of profits—Article applicable.*

A suit between co-sharers for a share of profits is not for accounting, and consequently Art. 89 does not apply, and the suit is governed by Art. 120 of Sch. 1 of the Limitation Act, (*Harries & Ganganath JJ.*)

CHARAN SINGH vs. DIWAN SINGH.

1936 A.W.R. 700=1936 A.L.J. 924=
A.I.R. 1936 All. 706=165 I.C. 266.

Art. 90—*Suit by bank against Director acting as its agent—Limitation.*

A suit against a director of a bank in respect of a transaction in which he acted as an agent of the bank, for example, where he sanctioned a loan to a person, is a suit by a principal against an agent, and is, for the purpose of limitation, governed by Art. 90 of the Limitation Act. (*Coldstream & Jaisal JJ.*)

PEOPLE'S BANK OF NORTHERN INDIA LTD. vs. HARGOPAL.

38 P.L.R. 526=160 I.C. 759=A.I.R.
1936 Lah. 271.

Art. 96—*Suit for certification of petition of adjustment of decree—Limitation.*

Limitation Act—(Contd.)

A suit for rectification of a petition of adjustment of a decree upon which an order of satisfaction has been passed is for the purposes of limitation governed by Art. 96 of the Limitation Act. (*Guho & Bartley. JJ.*)

ABDUL SATTAR CHOWDHURY vs. ABDUL RUBAN.

40 C.W.N. 914=165 I.C. 756=A.I.R.
1936 Cal. 400.

Art. 102—*Suit for recovering money from dismissed employee—Defendant claiming set off on account of arrears of pay—Suit filed within three years of dismissal and admitting arrears of pay—Claim for arrears, if barred.*

In a suit for the recovery of a certain amount alleged to be due from a dismissed employee, a written statement was filed by the employee claiming a set off on account of arrears of pay. The plaintiff, in his plaint which was filed within three years of the dismissal of the defendant, admitted that the arrears were recoverable from him and in fact deducted the amount from his claim in the suit. *Held*, that the defendant's claim for the arrears of pay could not be said to have been barred at the date of the written statement which was filed within 3 years from the date of the filing of the plaint. (*Nasim Ali & Henderson JJ.*)

JITENDRANATH ROY vs. GNADA KANTA DAS GUPTA.

A.I.R. 1936 Cal. 277.

Arts. 102 & 131—*Suit by archaka for arrears of wages brought after three years, if barred.*

The plaintiffs who were subordinate archakas in temple sued the trustees of the temple for *tastik* allowance in lieu of wages for services done by them. The funds out of which this allowance was to be paid had originally come from the Government. The suit was brought more than three years after the date when the wages fell in arrear. *Held*, that if the money was in fact payable by the trustee to a temple servant in lieu of wages for services rendered in the temple, the fact that the money out of which these

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wages were paid came originally from the funds of the Government did not affect the question of limitation. Therefore, the proper Article of the Limitation Act to apply to the case was Art. 102 and not Art. 131. Hence the suit was barred by limitation. 65 M. L. J. 132 applied; 38 Mad. 916 & 36 M. L. J. 375 distinguished. (*Wadsworth J.*)

SHIVARAM JOI SHA vs. NAGAPPAYYA.
70 M.L.J. 220 = 43 M.L.W. 431 = 1936
M.W.N. 156 (2) = A.J.R. 1936 Mad. 149
= 161 I.C. 475.

Art. 103—Demand for dower—husband promising to pay but desiring time—limitation when commences.

Under Art. 103, Limitation Act, time begins to run not from the date of the demand of the dower but from the date of the refusal. Where on the dower being demanded by the wife the husband promising to pay it though he wants time, limitation does not run from the date of demand. (*Addison & Abdul Rashid JJ.*)

MST. RAZINA KHAQON vs. MST. ABIDA KHATOON.

1936 A.W.R. 1049 = 1936 A.L.J. 1328.

Art. 106—Suit against son for debts due from deceased partner—limitation.

Where a partnership is dissolved on the death of a partner, and it is sought to make the sons of the partner liable for debts due from him as a member of the partnership, a suit against him for recovery of the debts is governed by Art. 106, Limitation Act and must be instituted within 3 years of the death of the partner. (*Addison & Abdul Rashid JJ.*)

KANHAYA LALL vs. FIRM DEBI DAVAI BRIJ LAL.

A.J.R. 1936 Lah. 514.

Art. 110—Suit for money due on a settlement of date and palm trees—Limitation.

A person taking settlement of date and palm trees for a season for the purpose of taking the juice from the trees cannot be said to have been admitted to occupation of

Limitation Act—(Contd.)

any land. Therefore a suit to recover the payments due under the settlement is not governed by the B. T. Act, and such a suit must for the purposes of limitation be governed by Art. 110 of the Limitation Act. (*Agarwalla & Rowland, JJ.*)

KAMESHWAR SINGH vs. MAHABIR PASHI.

15 Pat. 626 = 17 P.L.T. 363 = A.J.R. 1936 Pat. 403.

Art. 115—Suit for recovery of money—Commencement of limitation.

A owed money to B, and on 27th January, 1928 he drew a bundi in favour of B for the amount due from him to the latter. It was drawn on one C. On the same day, B made entries in his books crediting the amount of the bundi to A and debiting the same to C. It was not known whether C made any corresponding entries in his books but it was proved that he accepted the bundi. On the 29th April 1931, C executed a document in favour of the heirs of B, who had in the meantime died thereby discharging the liability under the bundi. C then filed a suit against A for recovery of money paid by him to the heirs of B. It was contended that the suit was barred by time as limitation commenced to run from 27th January, 1928. *Held*, that the suit was within time as limitation had commenced to run from 20th April, 1931 and not from 27th January, 1928, and the suit had been filed within 3 years from the former date. (*Jai Lal J.*)

BODA RAM vs. JOINT HINDU FAMILY OF DEBIDAS HARICHAND.

38 P.L.R. 276 = 183 I.C. 928 = A.J.R. 1936 Lah. 668.

Art. 116—Suit for refund of money paid as premium of lease, on the lease being declared void on the ground of lessor's incapacity to make such grant.

Where a lease of a piece of land effected by a registered instrument is found to be invalid by reason of the lessor's incapacity to make the grant, a suit by the lessee for refund of the money paid as premium is governed by Art. 116, Limitation Act, and

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not by Arts, 65 & 97 of the Act. 6 Pat. 606 & 44 Cal. 759. (*Wort A. C. J. & Fenzl Ali J.*)

RAJENDRA NARAYAN SINGH DEO vs. LALMOHAN TRIBNI.

A.I.R. 1936 Pat. 462 = 164 I.C. 277.

Art. 120—*Successive invasions or denials of right—commencement of limitation.*

Where there are successive invasions or denials of a right, time will, ordinarily run from the first of the series. But an exception to this rule may be allowed in special cases, where, for instance, the later invasion is of a different and more serious kind than the former one. 37 M. L. J. 213, 42 M. L. J. 457, 54 Bom. 4 & 3 Lah. 43 followed. (*Curgenven & King JJ.*)

PONNU NADAR vs. KUMARU REDDIAR.

59 Mad. 75 = A.I.R. 1935 Mad. 967 = 161 I.C. 653.

Art 120—*Suit for Declaration of right—each invasion of right, if gives fresh cause of action.*

A suit for a declaration of right cannot be held to be time barred so long as the plaintiff has a subsisting title to the property. In such a case, each invasion of right gives a fresh cause of action. The mere fact of forbearance on a previous occasion on the part of person in possession cannot debar him from instituting a suit later on when a fresh invasion is made against his title which gives him an independent cause of action. 20 Cal. 906 & Lah 428 relied on. (*Srivastava & Nanavutty JJ.*)

PARTAB BAHADUR SINGH vs. JAGAT-JIT SINGH.

1936 O.W.N. 784 = 164 I.C. 118 = A.J.R. 1936 Oudh. 387.

Art. 120—*Suit for declaration that plaintiff had obtained possession outside Court—Limitation.*

Limitation Act—(Contd.)

A suit for declaration that the plaintiffs had previously obtained a decree for a declaration in the lifetime of the alienor, that the alienation was not binding on them after the alienor's death, that they had deposited the money found in previous suit for necessity in Court, and that they had obtained possession of the land out of Court, and that they should be declared owners of the land, is governed for the purposes of limitation by Art. 120 of the Limitation Act. (*Jailal J.*)

ISSUR DAL vs. GHULAM MOHAMMAD.

38. P.L.R. 537 = 165 I.C. 149 = A.I.R. 1936 Lah. 835.

Art. 120—*Suit for declaration of title and that settlement record is erroneous and fraudulent—Court-fee payable.*

A suit for a declaration that the settlement record is erroneous and fraudulent, and for a further declaration of the plaintiff's title, without any claim for possession, is governed by Art. 120 Limitation Act. Time runs from the final publication of the record-of-rights. The mere fact that the plaintiff pays an *advalorem* court-fee makes no difference. (*Wort & Rowland, JJ.*)

SUDHAKAR MISRA vs. NILKANTHA DASS.

A.I.R. 1936 Pat. 129 = 161 I.C. 485.

Art. 120—*Limitation for suit by one pre-emptor claiming superior right against another.*

Art. 120, Limitation Act is applicable to a suit by one pre-emptor against another claiming that the former has a superior right of pre-emption and that a decree obtained by the latter was vitiated by fraud. (*Bhide J.*)

JABA KHAN vs. DITTA.

A.I.R. 1936 Lah. 503 = 164 I.C. 366.

Art. 120—*Suit by Hindu against Hindu female holding estate under a bequest for declaration that alienation by her did not bind him—limitation.*

Limitation Act—(Contd.)

A suit by a Hindu for declaration that an alienation made by a Hindu female holder of a life estate in possession by virtue of a grant, transfer inter vivos, or by virtue of a bequest, is void and not binding on him is governed by Art. 120, Limitation Act, and the limitation of six years provided by that Article commences to run from the time the right to sue accrues, i.e. the date of transfer. (*Khaja Mohamed Noor & Saunders JJ.*)

KANHAYA LAL MISSIR vs. MST. HIRA BIBI.

15 Pat. 151 = 17 Pat L. T. 131 = A.I.R. 1936 Pat. 323 = 163 I.C. 940.

Art. 120—Compensation for imposing restriction on raising coal—Refusal to follow the procedure and pay compensation—limitation.

When in a case of imposing restrictions on working a coal mine, the Government refused to follow the procedure for ascertaining compensation, and paying compensation, there is no continuous cause of action and six years limitation will apply under Art. 120 Limitation Act. (*Courtney Terrel c. g. & Dhavle .*)

SECRETARY OF STATE vs. LOENA COLLIER.

15 Pat. 510 = 17 P.L.T. 179 = 164 I.C. 860 = A.I.R. 1936 Pat. 513.

Art. 120 & 144—Suit against co-heirs for share of estate and account of business— limitation.

Where an estate consists partly of immovable property and partly of business, a suit by an heir of the estate against his co-heirs in possession, for recovery of possession of his share must be brought within twelve years of the death of the ancestor under Art. 144, Limitation Act, but so far as the claim for accounts of the business is concerned, the suit must be brought within six years under Art. 120, Limitation Act. (*Leach J.*)

MOHAMMED AMEEN vs. EUSOF HAJER AHMED

A.I.R. 1936 Rang. 407.

Limitation Act—(Contd.)

Art. 120 & 144—Claim by mortgagee in possession for equity of redemption— limitation.

A claim by a mortgagee in possession for equity of redemption is one for possession of an interest in immovable property within the meaning of Art. 144, Limitation Act. Art. 120, of the Limitation Act has no application to such a suit. (*Srivastava J.*)

UDAI BHAN SINGH vs. SHEO-AMBAR SAHAJ.

1936 O.W.N. 243 = 160 I.C. 920 = A.I.R. 1936 Oudh. 168.

Art. 120 & 144—Suit for having lease cancelled— limitation.

A pujari of a temple who had power to alienate temple property for necessities, gave a permanent lease of temple properties, for Rs 8000, but the actual sum necessary was Rs. 400, only. The lease was therefore not absolutely void, but only voidable. Thirty years after the lease, the successor of the Pujari sued to have the lease cancelled. It was contended that the suit was timebarred not having been brought within 12 years of the grant of the lease. *Held*, that as the lease was not void *ab initio*, but only voidable, and the grantor of the lease would have been estopped from avoiding it, the opportunity to avoid the lease arose only when the succeeding pujari came into office. The suit was therefore, within time if brought within 12 years of the date when the succeeding pujari came into office. (*Pandurang Rao J.*)

VEERANA GOUNDAN vs. SELLAPA GOUNDAN.

A.I.R. 1936 Mad. 262 = 162 I.C. 325 = 1936 M.W.N. 476.

Art. 120 & 144—Land leased out after being mortgaged—Suit by mortgagee for possession of the land—Article applicable.

Where a land was mortgaged to a certain persons, and thereafter leased out to certain other persons and the mortgagee having purchased the said land in execution of his mortgage decree, sued the lessees for pos-

Limitation Act—(Contd.)

session of the lands, held, that for purpose of limitation, the suit was governed by Art. 144 and not by Art 120, Limitation Act because, it was not necessary for the plaintiff to sue or pray for cancellation of the lease. (*Zia-ul-Husan J.*)

TULSI RAM vs. MUNNA KUAR.

1936 O.W.N. 399 = 162 I.C. 225.

Arts. 120 & 144—Magistrate attaching property in proceedings under Sec. 145, Cr. P. Code and giving possession to Receiver—suit for mere declaration of title, if maintainable.

Where, in proceedings under Sec. 145, Cr. P. Code, the Magistrate passes an order for attachment of the property and the *Tasildar*, who is appointed Receiver takes possession of the property, the possession of the Receiver, is in the eye of law, the possession of the true owner, and the latter can undoubtedly maintain a suit for a mere declaration of his title and it is not necessary for him to institute a suit for possession. As a suit for declaration of title to immovable property, it is clearly governed by Art. 120, Limitation Act and not by Art. 152 of the Act. (*Srivastava & Nanavutty JJ.*)

PARTAB BAHADUR SINGH vs. JAGATJIT SINGH.

3036 O.W.N. 784 = 164 I.C. 118 = A.I.R. 1936 Oudh. 387.

Art. 124—Suit for declaration of plaintiff's right to sebatship—Limitation.

A suit by a person in possession of the office of the the sebat of an idol for a declaration of his title to a certain share in the *pala* or the turn of workshop of the idol, is governed by Art. 124, Limitation Act, in a case where the office of the shehait was held by another person for more than 12 years. As the right of the office is extinguished by adverse possession, the right to claim *pala* must share the same fate. (*Nasim Ali & Edgely JJ.*)

HARM PADA ROY vs. GOPINATH ROY.
A.I.R. 1936 Cal. 291.

Limitation Act—(Contd.)

Art. 125—Application of the Article.

Art. 125 of the Limitation Act applies when the possession is that of a Hindu or Mahamedan female as such, that is to say, by virtue of her being a Hindu or Mahamedan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos*, or by virtue of a bequest, in other words, when her possession is irrespective of her being a Hindu or Mahamedan female. (*Khaja Mohammed Noor & Saunders, JJ.*)

KANHAYA LALL MISSIR vs. MST. HIRA BIBI & ORS.

15 Pat. 151 = 17 P.L.T. 131 = 163 I.C. 940 = A.I.R. 1936 Pat. 323.

Arts. 127 & 144—Person in possession of an estate with permission of the owner claiming the estate as co-owner—Limitation for the suit.

The plaintiff who was in possession of a part of an estate with the permission of the defendant who was the owner thereof claimed partition of the estate as a co-owner. The defendant set up a plea of limitation. Held, that the mere fact that the plaintiff was in possession of the land admittedly with the permission of the defendant was of no avail. The question would, however, have been different, if the plaintiff had claimed as member of a coparcenary, in which case Art. 127 of the Limitation Act would have applied, but inasmuch as the plaintiff put up his case on the ground of co-ownership, the suit was for purposes of limitation governed by Art. 144, Limitation Act. (*Gruer & Neogi, A. J. C.*)

RATAN SINGH CHHATHI vs. JAIRAM SINGH.

31 N.L.R. 191 = A.I.R. 1936 Nag. 80 = 162 I.C. 577.

Art. 130—Ryot holding land without payment of rent—Suit by landlord for assessment of rent—Limitation.

As between the ryots of an estate and the landlords of an estate, when a ryot holds land of an estate without payment of rent,

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limitation against the landlord will only arise 12 years after the landlord has come to know that the defendant possesses the land without payment of rent. A suit for assessment of rent instituted within 12 years from the date of the final publication of the Record-of-rights recording that the tenants have been holding the land without payment of rent, is, therefore, not barred by limitation when there is nothing to show that prior to the final publication of the Record of rights, the landlord was aware that the tenants were holding the land without payment of rent. 40 Cal. 173 referred to; 22 C. L. 135 distinguished. (*M. C. Ghose, J.*)

CHANDRA KUMAR DE vs. K. C. MUKHERJEE.

A.I. R. 1936 Cal. 289.

Art. 132—Suit against mortgagor by person claiming under him to enforce mortgage—limitation.

A suit brought by a simple mortgagee against the mortgagor or persons claiming under the latter, to enforce the mortgage by sale, is governed by Art. 132 of the Limitation Act. 30 Mad. 426 relied on. (*Ramesan & Stone, J.J.*)

SAMBASIVA AYYAR vs. SUBRAMANIA PILLAI.

59 Mad. 312 = 44 M.L.W. 887 = A.I.R. Mad. 70.

Art. 132—Mortgage debt payable in instalments—Penal clause authorising mortgagee to recover entire amount in case of default—limitation.

A mortgage bond provided that the debt was to be repaid in instalments and in case of default of any one instalment, the mortgagee was to have power to recover the expired and unexpired instalments in one lump sum by sale of the mortgaged properties. Held, that the cause of action in respect of any particular instalment was different from the cause of action in respect of any other instalment. In each case what had to be considered was how much had fallen due and had not been barred by limita-

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tion and secondly, how much remained to be paid even though up till that moment the instalments had not fallen due. (*Courtney Terrel C. J. & Varma J.*)

RAGHUNANDAN SINGH vs. KISHAN SINGH.

15 Pat. 1—16 P.L.T. 893.

Art. 132.—Suit for contribution in respect of payment of maintenance allowance made by plaintiff from co-owner of the property charged—limitation.

A suit for contribution by a person who has paid maintenance allowance charged on two properties in the ownership of the plaintiff and the defendant respectively is governed by Art. 132, Limitation Act. (*Nanavutty & Zia-ul Hossain J.J.*)

VIQAR ALI BEG vs. MAHOMMED SAADUT ALI KHAN.

1936 O.W.N. 982.

Art. 142—Suit for possession—Defendant claiming title by way of transfer—Presumption, if in favour of plaintiff's continuance of possession.

In a suit for possession of a certain land, the plaintiff alleged that he was the owner of the land and previously in possession of the same. The defendant pleaded that he had title to the land by way of a definite transfer. Held, that under the circumstances no presumption could arise in favour of the continuance of the plaintiff's anterior ownership, and if he wanted to succeed he had to prove that he had been in possession within 12 years of the suit. (*Mackney J.*)

MA PYAN GYI vs. U SHWE KYUN.

A.I.R. 1936 Rang. 124 = 161 I.C. 833.

Arts. 142 & 144—Suit for recovery of possession on ground of plaintiff's dispossession—Article applicable.

A suit for recovery of possession on the ground of the plaintiff's dispossession is gov-

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erned by Art 142, Limitation Act, and not by Article 141. (*Suteman O. J. & Bajpai JJ*)

RAMAMANOHAR vs. BABY SINGH.

1936 A.W.R. 1014.

Art. 143—Sale deed by tenant—Deed subsequently registered—Suit by landlord challenging alienation—Limitation.

The plaintiff brought a suit challenging an alienation made by his tenant. The alienation was by a deed executed on one day and registered on a subsequent date. The plaintiff's suit was within time if limitation was reckoned from the date of registration. *Held* that time began to run under Art. 143, Limitation Act from the date when the forfeiture was incurred, i.e., when the deed was executed and hence the plaintiff's suit was barred by limitation. (*Coldstream & Abdul Rashid JJ.*)

DHUMAN KHAN & ORS. vs. GURMUKH SINGH & ORS.

17 Lah. 403 = A.I.R. 1936 Lah. 394 = 38 P.L.R. 887.

Art. 143—Tenant mortgaging property—Landlord not challenging it though aware—Mortgagee selling property in execution—Objection by landlord to the sale dismissed—Dismissal objection if gives fresh time for limitation.

A landlord who was aware of a mortgage executed by his tenant took no steps to challenge the same but after the mortgagee had obtained a decree and sought to have the property sold in execution, the landlord raised an objection which was dismissed. The landlord thereupon brought a suit to set aside the sale. *Held*, that as the plaintiff's claim against his tenant was barred at the time of objection, the dismissal of the objection could not give a fresh period of limitation. (*Coldstream & Abdul Rashid JJ.*)

DHUMAN KHAN vs. GURMUKH SINGH.

17 Lah. 403 = 38 P.L.R. 889 = A.I.R. 1936 Lah. 394.

Art. 144—Suit for share of estate carried by mother to her re-marriage—limitation.

A suit by a daughter claiming a share of the estate carried by her mother, to her re-marriage must be brought within twelve years of the remarriage under Art. 144, Limitation Act, as the interest of the child becomes vested in such property from the moment of the remarriage. (*Mosely & Ba U. JJ.*)

MA PWA vs. TASUDUT.

A.I.R. 1936 Rang. 388 = 164 I.C. 556.

Art. 144—Suit for recovery of possession by mortgagee auction purchaser against purchaser of equity of redemption—limitation—possession of purchaser when becomes adverse.

The plaintiff in execution of a mortgage decree purchased the mortgaged properties and obtained delivery of possession through Court. The defendant had during the pendency of the mortgage suit purchased the said property by private sale and had got herself registered in the landlord's register. More than 12 years after from the date of the sale, the plaintiff sued for recovery of possession of the land in question. The defendant contended that the suit was time barred. *Held*, that as the defendant had continued in possession in spite of delivery of possession to the plaintiff by the Court, her possession became adverse and time began to run against the plaintiff. The suit having been brought more than 12 years after the date of the sale was therefore barred. (*Courtney Terrell C. J. & Saunders J.*)

NARAYAN PROSAD PANDE vs. ADAR-MONI DAS.

15 Pat. 372 = 17 Pat. L.T. 546.

Art. 144—Person in adverse possession—Decree declaring that he has no title—Whether continuity of adverse possession interrupted.

A decree declaring that a party in possession of moveable property has no title to it, has not the effect of interrupting the continuity of his adverse possession as against

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the real owner, and if he continues in adverse possession for 12 years before suit, his title is perfected. 46 Mad. 751 relied on; 46 Bom. 710 dissented from. (*Bajpai J.*)

MOHAMMAD TAHAIK vs. BACHEY LAL.

1936 A.W.R. 390=1936 A.L.J. 583
=162 I.C. 907=A.I.R. 1936 All. 381.

Art. 144—*Possession under permanent lease from manager of a temple, if adverse from date of lease—New manager not repudiating lease, whereby lease, forfeited—Dismissal of such suit and acceptance of rent thereafter—Possession of lessee if adverse—Sub-lessee, if may be ejected.*

Where after a succession of managers have kept on a lease granted by a previous manager by acceptance of rent, a new manager comes to office and his dealings are such as to suggest that he accepted rent as payable not in respect of new tenancy created by him but as payable in respect of a permanent right which it was no longer in the powers of the temple to repudiate, the possession under the lease is adverse and after 12 years of such possession has elapsed, it is no longer open to the manager to eject the sub-lessee from the lease. (*Sir George Rankin.*)

DAIVA-SIKHAMANI PONNAM BALA DESKAR vs. PERIYANAN CHETTY.

63 I.A. 269=59 Mad. 899=71 M.L.J. 105=41 M.L.W. 1=1936 M.W.N. 733
=38 Bom. L.R. 702=40 C.W.N. 901
=63 C.L.J. 491=1936 A.L.J. 977=1936 A.W.R. 975=38 P.L.R. 793=17 P.L.T. 480=1936 O.W.N. 566=162 I.C. 465=A.I.R. 1936 P.C. 183.

Art. 148—*Tenant mortgaging, holding to another and subsequently selling same to a third person—Purchaser suing mortgagee for possession on redemption after 12 years—Right to redeem.*

A tenant after mortgaging his holding transferred the same to a third person by sale. The vendee more than 12 years later sued the mortgagee for possession of the

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mortgaged property subject to redemption. The mortgagee contended that the mortgage was invalid and therefore the suit for possession having been brought more than 12 years from the date of purchase was barred by limitation. *Held*, that in a mortgage transaction whether the mortgage is valid or not, the position of the mortgagee is that of a mortgagee and nothing more. Therefore the right of the vendee to redeem was not extinguished until the period of limitation provided by Art. 148, Limitation Act had elapsed. (*Wart J.*)

BAIJNATH PRASAD SINGH vs. MUNESWAR SING & ORS.

A.I.R. 1936 Pat. 63=160 I.C. 1066.

Art. 148—*Mortgage by one of three brothers—Sale in execution and purchase by mortgagee—Mortgagee taking possession on paying off prior mortgage—Claim by heirs of the other two brothers for possession of 2/3rd. share on paying proportionate sum—Limitation.*

One of three brothers having mortgaged his share of a house, the mortgagee obtained a decree, and in the sale in execution of his decree purchased the property and obtained possession of the same by paying off the prior mortgage. The heirs of the other two brothers thereafter brought a suit on the ground that they were entitled to possession of the 2/3rd. share of the house on payment of the proportionate sum. *Held*, that the subsequent mortgagee had been subrogated to the rights of the prior mortgagee by paying him off and was therefore a mortgagee within the meaning of Art. 148 Limitation Act and the suit, was therefore governed by that article; and not Art. 144. (*Fazl Ali & Luby JJ.*)

RAMDOYAL SEN vs. CHAKRAPANI NANDI.

A.I.R. 1936 Pat. 60=160 I.C. 933.

Art. 152—*Knowledge of party regarding date of decree or judgment, if material.*

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Art. 152, Limitation Act, lays down that an appeal to the Court of the District Judge must be filed within 30 days computed from the date of the decree or order appealed from. There is no question of the knowledge of the party desiring to file an appeal regarding the date of the decree or judgment. (*Agha Haidar J.*)

LADHA MAL BISHEN DAS vs NADAR.

A.I.R. 1936 Lah. 742.

Art. 193—*Ex parte decree set aside in absence of plaintiff—Plaintiff absent on date of rehearing of suit—Suit dismissed—Application for restoration of the suit—Limitation.*

When an order setting aside an *ex parte* decree has been passed in the absence of the plaintiff there is no obligation to issue again a notice to the plaintiff of the date on which the restored case is to be taken up. Therefore, where on the date so fixed, the plaintiff is absent and his suit is dismissed and he applies for restoration of the suit the application must, for the purpose of limitation, be governed by Art. 163 of the Limitation Act, (*Currie J.*)

MST. KARAM BHARI vs. JAGANNATH.

38 P.L.R. 697—A.I.R. 1936 Lah. 1495.
= 163 I.C. 274.

• **Art. 181**—*Application for ascertainment of mesne profits—limitation.*

In Madras, when the Court directs an enquiry for the ascertainment of mesne profits, the decree-holder must apply for the ascertainment of such profits Art. 181, Limitation Act applies to such an application. 54 M. L. J. 655 relied on (*Beasley C. J. & Stodart J.*).

RAMA RAO vs. SREE RAMAMURTH.

71 M.L.J. 388 = 1936 M.W.N. 575 = 44 M.L.W. 436 = A.I.R. 1938 Mad. 801 = 164 I.C. 670.

Art. 382—*Decree-holder entitled to apply for execution delaying to do so negligently—Article applicable.*

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Art 182, Limitation Act, applies to a case in which a decree-holder who could have applied for fresh execution at any time after the dismissal of the first execution case delays to do so, but the delay is due to his own negligence or laches and not to any defect in the decree or to any circumstances connected with the decree preventing him from putting an application for execution. (*Burn & Menon JJ.*)

JAGADISAN PILLAI vs. NARYANAN CHETTIAR.

59 Mad. 759 = 71 M. L. J. 180 = 44 M.L.W. 403 = 1936 M.W.N. 364 = A.I.R. 1936 Mad. 284 = 162 I.C. 376.

Art. 182—*Objection as to limitation not taken in previous execution case dismissed for default on date fixed for appearance—Such objection if may be raised in subsequent proceeding.*

An execution case was fixed for hearing on a certain date but the return of service not having been received, the time was extended till another date but on the date so fixed, the case was dismissed for default, and the judgment-debtor also did not appear. Held, that the judgment-debtor was not precluded from raising the plea of limitation in a subsequent execution case. (*Guha & Bartley, JJ.*)

IBRAHIM MIA DEWAN vs. JAMIN ALI MORHAL.

40 C.W.N. 510.

Art. 182 (2)—*Dismissal of appeal for non prosecution—Limitation for execution of the decree—Date from which limitation runs.*

A dismissal of an appeal for non-prosecution, after a dismissal, for non-appearance of the parties does not constitute a final decree or order within the meaning of Art. 182 (2), Limitation Act. In such a case there is practically no appeal and the decree of the lower court stands unaffected. Hence limitation for execution of the decree runs only from the date of the decree are not from the date of dismissal by the appellate Court. 36 All. 350. 49 Cal. 203 & 11 Pat.

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477 relied on; 2 P. L. T. 28 dissented from. (*Bhude J.*)

SECRETARY OF STATE vs. MST. RESHMO & ORS.

A.I.R. 1936 Lah. 479

Art. 182 (5)—Steps in aid of execution—classes of,

Steps in aid of execution of a decree may be broadly divided into two classes, namely, (1) Steps taken with the object of removing certain obstacles in the way of execution; and (2) steps directed to the furtherance of or advancement of execution. To determine whether a particular proceeding is such a step, it is immaterial whether the step is in result successful or not. (*Srivastava & Thomas JJ.*)

RUDRA NARAIN vs. MAHARAJA OF KAPURTHALA.

1936 O. W. N. 134 = 160 I.C. 465 = A.I.R. 1936 Oudh. 248.

Art. 182 (5) — Application for transfer of decree, if a step-in aid of execution—Bonafide intention to execute, if necessary,

An application for transfer of a decree amounts to a step-in-aid of execution. A decree-holder is not required to show his bonafide intention or to prove that the step-in-aid of execution was taken by him, with a genuine intention to execute his decree. (*Sullaiman C. J. & Bennet J.*)

MANSARAM vs. BADRI PROSAD & ANR.

1936 A.W.R. 1936 = 1936 A.L.J. 254 = 163 I.C. 231 = A.I.R. 1936 All. 369.

Art. 182 (5)—Application for transfer of decree—order if judicial—whether extends limitations.

A decree-holder obtained a decree on 7th June 1931 and made an application for execution on 5th July, 1935. To save limitation he contended that an order made on 8th July 1932 on an application for transfer of the decree brought the case within the limit granted by Art. 182, cl. 5 of column 3. *Held*, an order made on an application for transferring the decree for execution to another Court is a step-in-aid to execution and gives a fresh start to the decree-holders under Art. 182(5). The order that is passed by the Court on such an application is a judicial order and therefore has the effect

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of making it a step-in-aid of execution. 54 Cal. 500 distinguished 1 Pat. 328 followed and 31 All. 396 referred.

BHAGWAT SAHAI vs. RAM SUKRIT RAY.

A.I.R. 1936 Pat. 313 = 162 I.C. 984.

Art. 183—Transmission of decree to another court for execution—Order by Master of High Court after serving notices under Or. 21, r. 16, C. P. Code—Question of limitation not considered—Order, if can operate as a revivor of the decree.

An order transmitting a decree to another court for execution, and order service of notices under Or. 21, rr. 16 & 22 of the C. P. Code by the Master of the High Court would not operate as a revivor of the decree within the meaning of the proviso to Art. 183 of the Limitation Act, when there was nothing to show either that he was asked to consider the question of limitation or that he actually did consider it, (*Fazl Ali & Ludy JJ.*)

SARJU SINGH ANR. vs. BHAGWAT PROSAD.

15 Pat. 102 = 17 P.L.T. 317 = 163 I.C. 411 = A.I.R. 1936 Pat. 398.

Art. 182 (5)—Application to Court to record payment made out of Court—if can save limitation.

An application by the decree-holder asking the Court to record a part payment towards the decree is not an application that can be called a step-in-aid of execution and hence such an application cannot be relied on for the purpose of saving limitation. 12 Cal 608, 2 All. 399 dissented from; 56 I. A 30 applied. (*Burn & Menon JJ.*)

PRESIDENT UNION BOARD, PENTAPADU & ANR. vs. THIRUMALA VENKATA SRINIVASA CHARYULU AYYAVARLU & ORS.

59 Mad. 424 = A.I.R. 1936 Mad. 115.

Art. 382 (5)—Order striking off execution case for partial satisfaction with costs whether a final order.

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An order passed in the following terms without notice to the parties, namely, "execution struck off on partial satisfaction of the decree; costs on the judgment-debtors" cannot be construed only as a provisional order suspending the application for execution, but it should be considered as the final order passed on the application for execution, within the meaning of Art. 182, Cl. 5, Limitation Act. (*Sulamon C. J., Rachpal & Allsopp JJ.*)

MAHAMMED TAQI KHAN vs. RAJARAM.

1936 A.L.J. 1140 = 1936 A.W.R. 996 =
A.I.R. 1936 All. 820.

Art. 182 (5)—Application claiming execution in regard to two suits—Application according to law in regard to items concerning one suit—inclusion of other items in regard to which application not entertainable—Effect of.

Where an application for execution claims execution in regard to two suits and it is according to law in regard to the items which are concerned with one suit, the mere inclusion of the other items in regard to which the application is entertainable would not make the whole application one which is not in accordance with law. (*Sulaiman C. J. & Bennet J.*)

MAHAMMAD SAKIR DAD KHAN vs. NANDKISHORE.

1936 A.W.R. 527 = 1936 A.L.J. 571 =
A.I.R. 1936 All. 467 = 163 I.C. 841.

Art 182 (6)—Execution petition returned to decree-holder for satisfying certain conditions, not re-presented—order returning petition, if a final order giving fresh starting point of limitation.

The words "final order" in Art. 182 (5) of the Limitation Act, as amended, imply that the proceeding has terminated so far as the Court passing it is concerned. An order returning an execution petition to the decree-holder for satisfying certain conditions cannot be regarded as "final," within the meaning of Cl. (2) of Art. 182, because such an order contemplates a fur-

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ther order to be passed at a later stage when the defects are remedied and the petition is re-presented. If in such a case the decree-holder fails to represent the execution petition, the order returning the petition cannot be relied upon by the decree holder as being a final order furnishing a fresh starting point of limitation. (*Venkatasubba Rao & Cornish JJ.*)

KESAVALOO vs. OFFICIAL RECEIVER, WEST TANJORE.

71 M.L.J. 336 = 44 M.L.W. 59 = 1936
M.W.N. 582 = 163 I.C. 354 = A.I.R. 1936
Mad. 613.

Sec. 182 (5)—Decree against minor represented by guardian—Death of guardian—Execution against minor represented by such guardian under bonafide mistake if can constitute a step-in-aid of execution.

A decree was passed against a minor who was represented by his mother as his guardian. She died and subsequently the decree-holder applied for execution, but by a bonafide mistake had the judgment-debtor represented by his mother. *Held*, that the application was under the circumstances of the case a step-in-aid of execution and saved limitation. 17 Mad. 76; 35 Cal. 1047 followed and 19 All. 391 not followed. (*Pollock J.*)

PRAHLAD PUNDALIK vs. MOHAN LAL BHOWANI LAL.

A.I.R. 1936 Nag. 77.

LUNACY ACT (IV OF 1912)

Sec. 77—Account filed by Manager of Lunatic estate objected to—Court hearing objection—Procedure to be adopted.

Where the accuracy of the accounts filed by the manager of a lunatic estate is impugned under Sec. 77, Lunacy Act, some kind of enquiry must be held under the section and in passing orders, reasons must be shown because the order passed is an appealable order, and the appellate court must be placed in a position of knowing what has moved the mind of the Judge in coming to the conclusion to

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which he came. (*Baguley & Mackney JJ.*)

MA AMINA BIBI vs. MA KHATUN.

A.I.R. 1936 Rang. 51=161 I.C. 5912.

Secs. 77 & 83—Order simply stating that accounts are passed, if appealable.

An order passed by the District Judge to the effect that the accounts filed by the Manager of a Luntic estate are passed must be deemed to imply that the objections to the accounts were rejected. Such an order being passed under a section which falls within Chap. V. Lunacy Act, an appeal lies to the High Court under Sec. 83 of the Act. (*Baguley & Mackney, JJ.*)

MA AMINA BIBI vs. MA KHATUN.

A.I.R. 1936 Rang. 51=161 I.C. 591 (2).

MADRAS ESTATES LAND ACT (I OF 1920)

Sec. 3 (3)—Holding—Parcels of land held under single engagement—Details of consolidated rent noted against separate parcels—Nature of holding, if changed thereby.

Where parcels of land are held under a single engagement, it constitutes only one entire holding' and the fact that details of the consolidated rent are given and noted against each parcel in the Patta would not make any difference, because, the entire rent is chargeable upon every piece of land comprised in the holding. 4 All. 174 disapproved. (*Venkataramana Rao, J.*)

TRUSTEES, CHOKKANATHA SWAMI TEMPLE, vs VADIVELMURGA NADAR.

A.I.R. 1935 Mad. 220=161 I.C. 230.

Sec. 3 (11) (a)—Fees charged for collecting rent if included in rent.

Fees charged for collection rent cannot be regarded as a payment payable by the tenant. So such fees cannot be regarded as rent within the meaning of Sec. 3, Madras Estates Land Act. 39 Mad. 84, 27 Mad 332

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17 Mad. 73 ; 40 Mad. 640 distinguished ; 18 I. C. 298 applied. (*Stone & Pandrang Row JJ.*)

BASUDEVA DOSS vs. HARIS CHANDANA JAGADDEVA GARU.

59 Mad. 408=A.I.R. 1936 Mad. 126 =159 I.C. 1092.

Secs. 24 & 30—Water cess -landlord when can claim extra charge for the same.

It is only when the landlord has constructed some work or maintained at his own expense some work for the purpose of supplying water to the lands in question, that he can claim any extra charge for water under the provisions of the Madras Estates Land Act. Where a landlord maintains a tank for particular lands, and from the surplus water overflowing from the said tank in flood time, other dry lands are converted into wet lands, the landlord is not entitled to extra charge for the water. (*Ramesam & Venkata Subba Rao JJ.*)

SUNDARAM PILLAI vs. KARUPPAYE AMMAL.

59 Mad. 5=160 I.C. 1015.

Secs. 24 & 30—Proper court. for adjudicating claim for enhancement of rent.

Under the Madras Estates Land Act, no enhancement can be claimed by the landlord except under the special provisions enacted in that respect, and one of them is that if the landholder wishes, to enhance the rent, he must do so by filing a suit before the Collector. The facts which determine the landlord's right to enhance rent, are of such a character under the Act that the legislature has thought it proper to vest the decision not in the Civil Court, but in the Revenue Court alone, and any claim made in the Civil Court must therefore be disallowed. (*Ramesam & Venkata Subba Rao, JJ.*)

SUNDARAM PILLAI vs. KARUPPAYE AMMAL.

59 Mad. 5=A.I.R. 1935 Mad. 1073=160 I.C. 1015.

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Sec. 30—Ground on which landlord can claim enhanced rent.

In order that the landlord may claim enhancement of rent, he must show that the productive power of the land has increased by some positive improvement effected by his agency or at his expense. He cannot claim enhanced rent merely and solely on the ground that his water has been used. He can make good his claim only by showing a direct connection between the water so used and the improvement he has effected, (*Ramesam & Venkata Subba Rao JJ.*)

S. P. SENDARAM PILLAI vs. KARUP-PAYEE AMMAL.

59 Mad. 5 = A.I.R. 1935 Mad. 1073 = 160 I.C. 1015.

Secs. 30 & 32—Improvement by landlord—right to claim enhanced rent.

Where a holding has been partly transformed from dry into wet and is governed by the Madras Estates Land Act, the proper course for the landlord at whose instance the improvement has been made, for enhancing rent is a suit under Sec. 30 of the Act. In order to be entitled to an enhancement, there must be provisions in the patte for enhancement of rent and there should be a fresh advantage to the tenant. 33 M. L. J. 355 & 25 M. L. J. 641 : 38 Mad. 514 considered. (*Beasley, C. J.*) *Stodart J.*

RAJA OF VIZIANAGRAM vs. NARAYAN-SWAMI NAIDU.

70 M.L.J. 494 = 43 M.L.W. 545 = 1936 M.W.N. 47 = A.I.R. 1936 Mad. 492 = 161 I.C. 742.

Sec. 37 (1)—Cause of action arising after suit and before disposal—power to grant relief.

Ordinarily a landlord should not be granted the indulgence of maintaining a suit when he had no cause of action when the suit was instituted, but the cause of action accrued before the disposal of the suit, as such indulgence is opposed to policy

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of law, being detrimental to raiyats. (*Pandrang Row J.*)

VENKATRAJU vs. VENKATASEETHA RAMACHANDRA RAO.

71 M.L.J. 218 = 44 M.L.W. 366 = 1936 M.W.N. 884 = 163 I.C. 607 = A.I.R. 1936 Mad. 504.

Sec. 37 (1)—Suit for enhancement, of rent—further enhancement, if can be claimed within 20 years.

The policy underlying the Madras Estates Land Act of 1908, that once there has been an enhancement, or a suit claiming enhanced rent has been dismissed on the merits there should be no fresh suit for enhancement for twenty years thereafter. That is not only the policy but also the effect of the words used in Sec. (1) of the Act, and the object of the provisions cannot be defeated by the landlord framing his second suit as a suit for arrears of rent, though it is in fact, one for enhancement of rent. (*Pandrang Rao JJ.*)

VENKATRAJU vs. VENKATASEETHA RAMACHANDRA RAO.

71 M.L.J. 218 = 44 M.L.W. 366 = 1936 M.W.N. 884 = 163 I.C. 607 = A.I.R. 1936 Mad. 504.

Sec. 111—Ijaradar if can bring holding to sale after lease for which arrears due has expired.

Merely because the lease of for a faali in which the arrears accrued has expired, an ijaradar cannot be said to be debarred from bringing the holding to sale. (*Burn & Menon JJ.*)

MOHAMMED GOSUKANI vs. MOHAMMED SEKKA MARAVAYAR.

59 Mad. 779 = 70 M.L.J. 146 = 1936 M.W.N. 119 = 43 M.L.W. 486 = A.I.R. 1936 Mad. 301 = 164 I.C. 645.

Sec. 130—Rights acquired by ijaradar purchasing land.

When an ijaradar purchases the land as he might do under the provisions of Sec. 130, what happens is that the defaulting

Madras Estates Land Act—(Contd.)

tenant loses his holding in which he held an occupancy right while the ijaradar acquires the holding but without acquiring the occupancy right. (*Burn & Menon JJ.*)

MOHAMMED GOSUKANI & ORS. vs. MOHAMMED SEKKA MARAVAYAR & ORS.

59 Mad. 779=70 M.L.J. 146=164 I.C.
645=1936 M.W.N. 119=43 M.L.W.
486=A.I.R. 1936 Mad. 301.

Sec. 146—Decree for arrears of rent—subsequent court sale—Landlord notified of such sale—recognition by him—Execution of rent decree without notice to purchaser, if binding on purchaser.

A purchaser of a holding in a sale held in execution of a mortgage decree is not bound by a subsequent sale of the said holding in execution of a rent decree obtained prior to the date of the mortgage sale without notice to him where he has given notice of his purchase to the land-lord and been recognised by the landlord, under Sec. 146, Madras Estates Land Act. 17 M.L.W. 361 relied on. (*Venkataramana Rao J.*)

SUBBARAYULU NAIDU vs. ARUNCHALA NADAR

70 M.L.J. 576=43 M.L.W. 672=1936 M.W.N. 531=162 I.C. 815=A.I.R. 1936 Mad. 465.

Sec. 151—Ejectment, if must be from entire holding.

The word "holding" in Sec. 151 means the entire holding, the holding taken as a whole defined in Sec. 3 (3). Sec. 151 does not in terms provide for the ejectment of a ryot from a part of the holding. The ejectment must relate to the entire holding. A landlord cannot break up his tenant's tenure by declaring that he has no longer any right to a portion although he holds the remainder, and it is an elementary principle of the law of ejectment that in a suit for ejectment one must eject as to all and not as to a part, (*Venkataramana Rao J.*)

TRUSTEES, CHOKKANATHASWAMI TEMPLE, VADIVELMURUGA NADAR.

A.I.R. 1936 Mad. 220=161 I.C. 230.

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895).

Sec. 5—Growing crops on village potter service inam land if exempt from attachment.

By virtue of Sec. 5 of the Madras Hereditary Village Offices Act, growing crops on village potter service inam lands are exempt from attachment in execution of a decree obtained against the service holder by reason of the fact that they are annexed to, and in fact form part of the emoluments attached to village offices. 23 Mad. 492 followed. (*Pandray Row, Wadsworth & Venkata ramana Rao JJ.*)

GOKAVARAPU SWAMI vs. MANDA SATREYA.

59 Mad. 1354=70 M.L.J. 266=43 M.L.W. 235=1936 M.W.N. 86=A.I.R. 1936 Mad. 283=162 I.C. 1008.

MADRAS LOCAL BOARDS ACT (XIV OF 1929)

Sch. 7. cl. (p) & (q) Local Board, if can demand license fee in respect of printing press worked by hand.

The provisions of Sch. 7, cl. (p) & (q) of the Madras Local Boards Act (1920) as amended by Act XI of 1930 having application to a printing press which is worked entirely by hand, and therefore a Local Board is not entitled to demand any licence fee in respect of such press. 51 Mad. 601, 92 I. C. 873 applied. (*King C. J.*)

SAVA BUSHANA MUDALIYAR vs. PRESIDENT PANCHAYET BOARD, {TIRUVALLUR.

59 Mad. 261=79 M.L.J. 113=43 M.L.W. 200=A.I.R. 1936 Mad. 204=1936 M.W.N. 191 (1)=161 I.C. 217

— *Surcharge certificates if can be issued against President of Local Board for illegal admission by Board of appeal against profession tax.*

Certain appeals from orders levying profession taxes were filed out of time, but nevertheless the Local Board considered the appeals and reduced the tax. The Examiner of Local Fund Accounts thereupon issued surcharge certificates against the President of the Local Board in respect

Madras Local Board Act—(Contd.)

of the amount allowed in the said appeals. *Held*, that the act of hearing appeals and reducing the profession tax was an act of the President in his individual capacity or even in his capacity as President. A surcharge certificate therefore could not be issued against the President, for perfunctorily condoning delay in filing appeals and illegally entertaining them. (*Varadachariar & Burn JJ.*)

SECRETARY OF STATE FOR INDIA *vs.* SIVASANKARAM. PILLAI.

59 Mad 876 = 70 M.L.J. 404 = 43 M.L.W. 507 = 1936 M.W.N. 154 = A.I.R. 1936 Mad. 412 = 163 I.C. 107.

MADRAS MARUMMAKATTAYM ACT (XXII OF 1933).

Secs. 38 & 50 (b)—Right of (Tavazhi) in a joint undivided family to demand partition.

The change in the law introduced by the Marumakkattayam Act has made the doctrine of severance of status applicable to *Tavazhis* under the Marumakkattayam law and for precisely the same reason. Under the new Law every *Tavazhi* in a joint undivided Marumakkattayam family has an indefeasible right to demand partition of its own share in the joint family property, and all the other *Tavazhis* must submit to it whether they like it or not. (*Burn & Menon JJ.*)

KUNCHI AMMA & *vs.* MINAKSHI AMMA.

59 Mad. 693 = 70 M.L.J. 114 = A.I.R. 1936 Mad. 155 = 1936 M.W.N. 27 = 43 M.L.W. 111 = 160 I.C. 594.

MADRAS MOTOR VEHICLES TAXATION ACT (III OF 1931).

Arrears of tax under the Act if constitutes debt having priority over all other debts.

The arrears of unpaid tax under the Madras Motor Vehicles Taxation Act are a debt due to the Crown, that is to say a Crown debt. The debt being created by Act is a speciality debt, and debts due to the Crown by record or speciality have

Madras Motor Vehicles Taxation—(Contd.)

priority over all other debts. Even regarding the debt as a simple debt, the Crown would have the prior right to payment over a simple creditor, because whenever the right of the Crown and the right of the subject in respect of payment of a debt of equal degree compete the Crown's rights prevail. (*Cornish J.*)

DEPUTY COMMISSIONER OF POLICE, MADRAS *vs.* S. VEDANTA.

59 Mad. 428 = A.I.R. 1936 Mad. 132.

MAHOMEDAN LAW.

Divorce—Deed providing for maintenance allowance—Provision that in case of default of any condition it would operate as one of absolute divorce—Validity.

According to Hanafi law a decree may be so pronounced as to come in to effect not immediately but at some future time contingently on the happening of some specified future event. Where a deed making provisions for the wife provides that in case of default of any condition, the deed would operate as a deed of *Talaq Kamil* (absolute divorce), the divorce comes into effect on the default having been committed. (*Gangannath J.*)

BACHCHOO LALL *vs.* MT. BISMILLAH.

1936 A.W.R. 214 = 1936 A.L.J. 302 = 163 I.C. 228 (1) = A.I.R. 1936 All. 387.

Divorce—Agreement after marriage by husband that on breach of certain condition wife would be entitled to divorce—validity of.

The husband after having lived with his wife for some time made an agreement that he would lead a respectable life, would earn his livelihood, maintain his wife, live in a house approved by his wife and her parents, and would otherwise behave properly towards his wife, and that if he made default in the performance of any of those conditions, the wife would be at liberty to divorce him. *Held*, that such an agreement was

Mohamadan Law—(Contd.)

not invalid or opposed to public policy. (*Jailal J*)

MUHAMMED YUSSEEN vs. NAMTAZ BEGUM.

35 P.L.R. 490 = 161 I.C. 701 = A.I.R. 1936 Lah. 716.

Divorce—*Suit by wife for declaration of divorce—notice to her, if may be presumed.*

Where in a suit by a wife for a declaration that she had been divorced, the husband pleaded that notice not having been served on her, the divorce was not valid, held, that the wife having filed the suit, it must be presumed that she had notice of the divorce. (*Jailal J.*)

MUHAMMAD ISHAQ vs. MST. SAIRAN.

38 P.L.R. 68 = 163 I.C. 953 = A.I.R. 1936 Lah. 611.

Dower—*Onus of proving that dower announced was not intended to be paid—Power of Court to reduce the settled dower.*

The settled dower must be paid, and the fact that the bridegroom has neither the present means nor expectation to pay the amount of dower, or that the amount is inordinately large is no reason for the Court to decree the suit for a smaller sum. If the bridegroom claims that the amount of dower publicly announced was never intended to be paid and only the smaller amount settled in private was payable, it is on him to prove the fact. (*Tekchand & Agha Haider J.*)

MAHAMAD SULTAN BEGUM vs. SARAJUDDIN AHMED.

38 P.L.R. 337 = A.I.R. 1936 Lah. 183 = 161 I.C. 300.

Dower—*Husband transferring property to wife in lieu of dower—wife knowing that transfer amounts to giving preference to her over other creditors—transfer if illegal.*

A transfer of property by the husband to the wife in lieu of her prompt dower,

Mohamedan Law—(Contd.)

even if the wife is aware that the transfer to her is tantamount to giving her preference over the other creditors is neither illegal nor void ab initio. In such a case the remedy of the creditors if there is not sufficient properties left to meet their claims, is to approach the Insolvency Court within two years of the transfer and get the debtor adjudicated an insolvent in which case they would be placed on the same footing as the preferred creditor and the transfer would be avoided by the insolvency Court. After two years has been allowed to elapse it is not open to the creditor to avoid the transaction merely on the ground that the effect of it was give preference to one creditor over the other even though it be shown that this was a fact known to both the parties. 43 Cal. 521, relied on. (*Sulaimain C. J. & Bennet J.*)

MST. RAZINA KHATUN vs. MST. ABIDA KHATUN.

1936 A.W.R. 1049 = 1936 A.L.J. 1328

Dower—*Wife in possession of her husband's property in lieu of dower—right to retain possession till dower debt is paid against husband's creditor.*

Where a Mohamedan lady is in possession of the property which has been given to her by her husband in lieu of her dower, and her right to hold the property is not disputed by her husband or his other heirs, she is entitled to remain in possession till her dower debt is paid. A creditor of her husband can only oust her if he can show that the transaction was fraudulent and was made with a view to delay his creditors. (*Ninmatullah & Rachphal Singh JJ.*)

KULSUM BIBI vs. SHYAMSUNDAR LAL.

1936 A.W.R. 797 = 1936 A.L.J. 1027 = A.I.R. 1936 All. 600 = 164 I.C. 515.

Dower—*Widow in permissive and not proprietary possession of her husband's property—right to retain possession until dower debt is paid, if exists.*

Where a Mahamedan widow is not in proprietary possession but merely in permissive occupation of her husband's pro-

Mohamedan Law—(Contd.)

perty, the rule of Mahamedan Law that she has a right to retain possession until payment of her dower debt does not apply. (*Bennet J.*)

SAMPTIA BIBI & ANR. vs. MIR MAH-BOOB ALI

1936 A.L.J. 911=1936 A.W.R. 687=
A.I.R. 1936 All. 528=164 I.C. 290.

Gift—Undivided shares of agricultural estate, if can form subjects of gift.

An undivided share of an agricultural estate can be made the subject of gift, and in such cases, if mutations take place subsequently on the shares defined in the gift even if no actual partition takes place between the various owners of the said property, the gift cannot be impugned on that score. (*Addison & Din Mohammad JJ.*)

NAZIR DIN vs. MOHAMMAD SHAH.

A.I.R. 1936 Lah. 92=161 I.C. 365.

Gift—Physical transfer of property if necessary when donor and donee are closely related.

In case the donor and the donee are related to each other as grandfather and grandson, it is unnecessary that the donor should physically part with the possession of the property. A mere intention on his part to treat the property as that of the donee and to divest himself of his own ownership is enough to constitute a valid gift. (*Addison & Din Mohammad JJ.*)

NAZIR DIN & ANR. vs. MOHAMMAD SHAH.

A.I.R. 1936 Lah. 92=161 I.C. 365.

Gift—Gift of a house in actual possession of donor and donee—Donor declaring that he has divested himself of ownership and authorising donee to take possession of gifted property—Gift, if valid.

All that is required under the Mahomedan Law as regards delivery of possession in cases of gift is that the donor should clearly divest himself of his ownership in the subject matter of the gift and should deliver such possession as is possible. Where

Mohamedan Law—(Contd.)

a house is in the occupation of the donor and the donee who are related as father-in-law and daughter-in-law, and the donor declares in unequivocal language that he has divested himself of ownership of one-half of it, retaining the other half and authorises the donee to take possession, the character of the donee's possession which already existed is altered, and the gift must be considered to have been perfected by such delivery of possession as was possible in the circumstances. (*Niamatullah JJ.*)

BALDEO PRASAD BALGOBIND vs. Mst. SHEBBRATAN.

1936 A.W.R. 506=1936 A.L.J. 590
=164 I.C. 720.

Gift—Gift of undivided share in houses and parcels of land—Donor who had constructive possession making complete transfer of gifted properties as circumstances permit—Validity of the gift

A Mahomedan lady executed a deed of gift of her share in a house and parcels of land and had it registered, and in the document she stated that she was in proprietary possession and was conveying to the donee the same sort of possession as she had herself, that she had given up possession and all proprietary rights in the subject matter of the gift and that the donee was at liberty to make transfers of the property in any way he might choose. Held, that the donor was in constructive possession and did practically all that she was able to do in the way of divesting herself of possession and putting the donee in a position to obtain possession, and the gift was therefore complete under the Mahomedan Law, (*Collister & Smith JJ.*)

HAMIDULLA vs. AHMEDULLA.

1936 A.L.J. 292=1936 A.W.R. 359
=163 I.C. 558=A.I.R. 1936 All. 473.

Gift—Application of the doctrine of Marzul maut—gift to a wife in consideration of dower while in Marzul-maut, how far valid.

The doctrine of marzul-maut in the Mahamedan Law applies to fifth and muhabat sales. A gift by a Mahamedan to his wife

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in consideration of her dower made by him while he is in *marz-ul-maut* is valid only in so far as the gift is supported by the amount of dower due. (*Pollock A. J. C.*)

MST. SUBHAN BI vs. MST. UMRAC BI.

31 N.L.R. (Supp.) 160 = 19 N.L.J. 53 =
= A.I.R. 1936 Nag. 113 = 161 I.C. 719.

Gift—Oral gift by husband to wife in lieu of dower—validity.

An oral gift made by the husband, in favour of his wife in lieu of her dower is valid in accordance with the rules of Mahomedan law and the provisions of Chap. VII of the T. P. Act. (*Niamatulla & Rachhpal Singh JJ.*)

KULSUM BIBI vs. SHYAM SUNDAR LAL & ANR.

1936 A.W.R. 797 = 1936 A.L.J. 1027 =
= A.I.R. 1936 All. 600 = 164 I.C. 515.

Gift—Gift made out of love and affection, if revocable.

Where the motive for a gift does not go further than natural love and affection for the donee, and there are no such services rendered by the donee as can constitute consideration for the deed of gift, the gift cannot be regarded as *hiba-bil-ewaz*, but a simple gift, which as a general rule may be revoked at any time subject to certain limitations. (*King C. J. & Nantvutty J.*)

RAJJAN KHATUN vs. IBRAR BANO

1936 O.W.N. 273.

Gift—Death time gift to some heirs excluding others if valid.

Amongst the Ismaili School of the Shia sect, a gift made by a person during death-bed illness to some of several heirs to the exclusion of other heirs is not valid to any extent, not even to the extent of one third of his property. (*Pandurang Row J.*)

ALI ABDOUL ALI SHAT vs. SHAFIA AEU.

71 M.L.J. 247 = 44 M.L.W. 346 = 1936
M.W.N. 966 = A.I.R. 1936 Mad. 432 =
163 I.C. 626.

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Gift—Gift of (*Mushaa*), if valid.

A gift of *Mushaa* is not void but only invalid. If a gift is invalid on the ground of *Mushaa*, possession given and taken under it transfer the property to the donee. (*R. C. Mitter J.*)

MOPEZUDDIN TALUQDAR vs. ABED ALI SHEIK.

62 C.L.J. 424.

Gift—*Mushaa*—Applicability of the rule.

The original rigidity of the rule of *Mushaa* has been considerably relaxed in its application to British India and in almost all cases which have come up before the Courts in India, as well as before the Privy Council, an effort has been made to adapt the rule to its new environments and so to interpret it as to make it consistent with the principles of justice, equity and good conscience. (*Addison & Din Mohamad, JJ.*)

NAZIR DIN vs. MOHAMMAD SHAH.

A.I.R. 1936 Lah. 93 = 161 I.C. 365.

Legitimacy—Marriage proved—presumption of legitimacy, if may be drawn.

Sec 112, Evidence Act applies by its terms to all classes of persons in British India and no exception is made in favour of Mahomedans. Hence, there would be a presumption under the Mahomedan Law of legitimacy, if the marriage is proved. (*Bennet J.*)

SAMPATIA BIBI vs. MIR MAHBOOB ALI.

1936 A.L.J. 911 = 1936 A.W.R. 687 =
A.I.R. 1936 All. 528 = 164 I.C. 290.

Marriage—Proposal and acceptance when and by whom to be made.

Under the Mahomedan Law, a marriage contract must be entered into either by the bride personally, or if she be a minor by her legal guardian, or somebody on her behalf. The proposal and acceptance must both be expressed at the same meeting, a proposal made at one meeting and an accep-

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tance made at another meeting renders the marriage contract invalid. (*Lort Williams & Jack J.J.*)

JOGU BIBI vs. MESEL SHAIKH.

63 Cal. 415 = 164 I.C. 957.

Marriage—Hindu acknowledging Mohamedan woman as his wife—conversion to Islam not proved—presumption of valid marriage, if arises.

Where the marriage of a Hindu with a Mohamedan woman is disproved and the alleged conversion of the Hindu to Islam is not found to be correct, the mere fact that the Hindu acknowledges the Mohamedan woman as his wife and a child born of such union as his daughter would not raise a presumption of a valid marriage. No such marriage is possible and no acknowledgment can legalise a marriage which is not legally possible. (*King C. J. & Zia ul Hassan J.*)

KEOLAPATI vs. HARNAM SINGH.

1936 O.W.N. 619 = 162 I.C. 527 = A.I.R. 1936 Oudh. 298.

Marriage—Guardianship for marriage.

In the presence of the first male cousin of a minor girl her mother is not competent to give her away in marriage. But, if she is so given, the marriage is not void but only invalid in the sense that on attaining puberty, the girl has the right to repudiate the marriage. (*Jailal J.*)

MOHAMMAD SHARIF vs. KHUDA BAKSH

36 P.L.R. 278 = 164 I.C. 713 (3) = A.I.R. 1936 Lah. 683.

Marriage—Agreement to pay a certain sum to daughter-in-law for pandan, if can be enforced by her.

An antinuptial agreement by a Mohamedan in favour of his son's wife, for the payment to her of a certain sum per month for her pandan expenses, is a binding contract, and the son's wife, being beneficially entitled under it, is entitled to bring a suit to enforce her claim under the agreement,

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although she is no party to the agreement. (*Srivastava A. C. J. & Zia-ul-Hasan J.*)

SAJJAD ALI KHAN vs. BADSHAH BEGAM.

1936 O.W.N. 744 = 164 I.C. 823 = A.I.R. 1936 Oudh. 385.

Marriage—Conversion of a Hindu to Islam marriage with Hindu wives if dissolved.

Under the rules of Mohammedan law applicable to Islamic States and under the law applicable to British India, the mere fact of conversion of a Hindu to Mohammedanism would not result in the dissolution of his marriage with his Hindu wives. Under the Hindu law apostasy or conversion to any faith does not affect the dissolution of marriage between Hindus. (*King C. J. & Zia ul-Hasan, J.*)

KEOLAPATI vs. HARNAM SINGH.

1936 O.W.N. 619 = 162 I.C. 527 = A.I.R. 1936 Oudh. 298.

Marriage—Marriage, if automatically dissolved on the wife embracing Christianity.

If the wife of a Mohamedan who had married her husband when both of them professed the Mahomedan faith, abjures Islam and becomes Christian during the subsistence of the marriage, the marriage is *ipso facto* dissolved. When the fact of the conversion is not disputed, the ulterior motive for the same is not to be taken into account and cannot affect the question. (*Agha Haidar J.*)

SARDAR MOHAMMED vs. MT. MARYAM BIBI.

A.I.R. 1936 Lah. 686 265 I.C. 383.

Marriage—Suit by wife for dissolution on the ground of husband's impotency—suit if liable to be adjourned for one year.

A suit by a Muhamedan wife for cancellation of her marriage on the ground of the impotency of her husband should be adjourned for a period of one year in order to ascertain whether the defect of impotency

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in the husband is removeable, because if during the period of one year for which the case is adjourned the defect in the husband is removed, the husband gets the substantial right of maintaining the marriage tie. (*Bhide J.*)

MST. FATIMA vs. JALALDIN.

38 P.L.R. 828 = A.I.R. 1936 Lah. 501 = 163 I.C. 751.

Minor—Power of guardian of a minor to alienate property belonging to the minor.

In the case of an alienation whether by way of a sale or mortgage by a guardian of a Mahomedan minor there must be an absolute necessity for the alienation or the alienation must be for the benefit of the minor. It is therefore always advisable that in cases of alienation by a guardian of the property of a minor the necessity for the alienation should be recorded in the deed. Where however there is no such recital in the deed other evidence of necessity may be adduced. (*M. C. Ghose J.*)

YEAJUDDIN PARAMANIK vs. RUPMUNJARI DAS.

A.I.R. 1936 Cal. 326.

Minor—Alienation of minor's property by defacto guardian—validity of—transaction if can be ratified by minor on attaining majority.

A transaction amounting to alienation of immovable property belonging to a Mahomedan minor, by the defacto guardian of the minor is void, and it cannot be ratified by the latter upon his attainment of majority. Even when the transaction has attained majority, it can subsequently be challenged by him or by his transferees, 39 I.A. 49 and 33 All. 783 relied on, 16 Cal. 627 distinguished. (*Sulaiman C. J. & Thom & Bennet JJ.*)

MST. ANTO vs. MT. REOTI KUAR & ORS.

1936 A.W.R. 961 = 1936 A.L.J. 1099 = A.I.R. 1936, All. 837.

Succession—Nature of possession of co-owners.

Mohamedan Law—(Contd.)

Mahomedan heirs inherit as tenants in common and a co-owner is presumed to hold on behalf of all, unless he indicates unmistakably that he intends to oust the others and to hold exclusively on his own behalf. Whether he must bring this intention home to the others may possibly be open to question in some cases, but it is unquestionable that he must at least indicate that to the outside world, and give his co-sharers an opportunity of realising what is happening if they are diligent. 62 Cal. 921 & 10 Lah. 849 relied on. (*Vivian Bose J.*)

KHWAJA AFZUL vs. MAHOMED SAHEB.

I.L.R. 1936 Nag. 177 = A.I.R. 1936 Nag. 214 = 165 I.C. 177.

Succession—Hindu becoming a Mahomedan and dying as such—Succession how regulated.

The law of succession in the case of a Hindu or a Mahomedan depends upon their own personal law. It depends on the law of their religion. When a person has changed his religion and changed his personal law, that law will govern the rights of succession to his estate. Where a Hindu became a Mahomedan, persons who could have been his Hindu reversioners if he had remained a Hindu, are not his heirs and have no right to succeed to his estate. 1930 A.L.J. 1237 followed. (*Bennet & Harris, JJ.*)

MAHOMAD ABDUL AZIZ KHAN vs. CHAUDHARI MAHBUB SINGH.

1936 A.L.J. 488 = 1936 A.W.R. 198 = A. I. R. 1936 All. 202 = 160 I. C. 48.

Succession—Relinquishment of right to succession—Validity.

A relinquishment of the right to succession made by a Mahomedan heir is not valid in law so as to be binding upon him in the sense that the estate passes to the person in whose favour the relinquishment is made. But there is nothing to prevent an heir from claiming a share in the property which has devolved on him or from

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so acting as to estop himself from claiming it. (*Sulaiman C. J. & Bennet J.*)

LATAFAT HUSSAIN vs. HEDAIF HOS-SAIN.

1936 A.W.R. 347 = 1936 A.L.J. 342 = A.I.R. 1936 All. 573 161 I.C. 851.

Succession—Husband executing deed of wakf in favour of wife and children—wife relinquishing right—both deeds forming part of same transaction—Wife, if can claim share in inheritance after death of husband.

A Mahomedan husband executed a deed of wakf of certain properties under which he appointed his second wife as the mutwali and constituted her children as the beneficiaries, and the wife executed a deed of release under which she relinquished her claim to her dower against the property of her husband, and also relinquished her claim to any inheritance in the estate reserved by him. The two deeds were executed at the same time forming part and parcel of of the same transaction. *Held*, that the wife could not after the death of her husband claim a share in the inheritance of the deceased. (*Sulaiman C. J. & Bennet J.*)

LATAFAT HUSSAIN vs. HEDAIF HOS-SAIN.

1936 A.I.R. 347 = 1936 A.L.J. 342 = A.I.R. 1936 All. 573 162 I.C. 85.

Wakf—Sunni Law—Essentials for the creation of a wakf.

Under the Sunni law it is not necessary that a wakf should be in writing. It is necessary that the creator of the wakf should transfer possession to the mutwali. The change in the nature of possession may be established by the production of accounts and the mere fact that the creator did not obtain mutation of the Zamindari property would not effect the validity of the wakf. (*Bennet & Harries JJ.*)

MAHOMAD ABDUL AZIZ KHAN vs. MAHBOOB SINGH & ORS.

1936 A.W.R. 195 = 1936 A.L.J. 488 = A.I.R. 1936 All. 202 = 160 I.C. 48.

Wakf—Hanafi law—delivery of possession, if necessary to constitute wakf.

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Under the Hanafi law, a mere declaration by the wakif is sufficient to complete a wakf, and it is not necessary that possession be delivered to the mutwali, and therefore, when the wakif is himself the first mutwali, no question arises as to a change in the character of possession. 46 Cal. 477 2 Illeg. 495 and 8 Pat. 484 relied on, (*King C. J. Srivastava & Zia-ul-Hasan. JJ.*)

RAHIMAN vs. BAQRIDAN.

1936 O.W.N. 165 = 160 I.C. 495 = A.I.R. 1936 Oudh. 213.

Wakf—Mere fact that income from a property is spent in upkeeping a mosque, if can lead to presumption that the property is wakf property.

The mere fact that the income arising out of a property has been appropriated for the upkeep of a mosque is not sufficient proof that it was endowed property. Where the finding is that there was an arrangement by which the property was put under the management of the family with a view that the income from the property should be applied for performing certain ceremonies at the tomb of the original owner, it cannot be said that there was an oral dedication and the property was wakf property. (*Srivastava & Zia-ul-Hasan JJ.*)

AHMED ASHRAF & ORS. vs. MURTAZA ASHRAF & ORS.

11 Luck. 93.

wakf—Wakf Alal Aulad—No object except maintenance of children specified—Extinction of line of wakif's descendants not contemplated—Wakf, if valid.

Where in a case of a wakf Alal Aulad there is no intention whatsoever what subject other than the maintenance of his sons and daughter, wakif had in mind and all the circumstances in the case lead to the conclusion that the wakif never contemplated that the line of his descendants would become extinguished and disliked the idea of any stranger becoming a mutwali, the wakf cannot be held to be a valid wakf and a mere recital in the deed that it is being made in accordance with the law

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is not sufficient to make it a valid wakf. *Sulaiman C. J. & Harris J.*)

RUQUIA BEGAM vs. SURAJ MALL.

1936 A.W.R. 278=1936 A.L.J. 231=
183 I.C. 314=A.I.R. 1936 All. 404.

Wakf—Wakf in respect of burial ground, if may be established in absence of direct evidence of dedication.

A Wakf in respect of a burial ground may, in the absence of direct evidence of dedication, be established by evidence of user; but the user from which dedication can be implied must be clearly established and must be of such a character as to be consistent only with dedication. Such user or dedication is required to be public user or dedication. (*Monroe J.*)

RAUSHAN DIN vs. MAHAMMAD SHARIF.

A.I.R. 1936 Lah. 871=161 I.C. 650.

Wakf—Public graveyard—Single burial if converts land into public graveyard.

A plot of land does not become a public graveyard and so a wakf, necessarily and immediately on the burial of a single person. Where there is an oral dedication for the purposes of a graveyard, the dedication may take effect on a single burial taking place which would be delivery as required by the Mohamedan Law of Gifts. (*Sir George Rankin.*)

BALLAV DAS & ANR. vs. NUR MOHAMMED & ANR.

40 C.W.N. 449=38 P.L.R. 182=17 P.L.T. 177=1936 A.W.R. 317=1936 A.L.J. 380=1936 O.W.N. 153=70 M.L.J. 455=160 I.C. 579.

Wakf—Plot of land used and recorded as graveyard—Plot if may be considered to be private property.

Where a plot of land is recorded as a graveyard in an old Khassra and shown as such in the map prepared at the first

Mohamedan Law—(Contd.)

regular settlement, but is latterly closed as a cemetery by an order of the municipal board, the land must be deemed to be a graveyard in the sense of the word as used in the Mohamedan Law, that is to say, *extra commercium* and dedicated for the benefit of the Mohamedans in general in the sense that private ownership therein does not exist. (*Sir George Rankin.*)

BALLAV DAS vs. NOOR MAHAMMAD.

40 C.W.N. 449=70 M.L.J. 455=43 M.L.W. 685=1936 A.L.J. 480=1936 A.W.R. 317=38 P.L.R. 182=17 P.L.T. 177=1936 O.W.N. 153=A.I.R. 1936 P.C. 83=160 I.C. 579.

wakf—Sale of land containing tomb of the owner—Site of tomb, if passes.

If the descendants of a deceased owner, whose tomb stands on his land, transfer the land, the transfer does not involve the sale of the site of the tomb itself when that tomb must be regarded as a dedicated spot. (*Sulaiman C. J. & Bennet, J.*)

NAZIRA & ORS. vs. SUKHDARSAN LALL.

1936 A.W.R. 365=1936 A.L.J. 651.

Wakf—Tomb standing on a piece of land—Presumption as to dedication of that part of site in which dead body is buried—Rights of Mohamedan community—Sale of land, if passes site of tomb.

Where a grave of a Mohamedan exists on a piece of land, the presumption is that that part of the site on which the dead body is buried is dedicated with the consent of the owners of the land and becomes sacred and ceases to be the private property of the former owners, and should be considered as a wakf land in which the members of the Mohamedan community would be interested and to which they would be entitled to have access. (*Sulaiman C. J. & Bennet J.*)

NAZIRA & ORS. vs. SUKHDARSAN LALL.

1936 A.W.R. 365=1936 A.L.J. 651.

Mohamedan Law—(Contd.)**Wakf—Powers of the Mutwali.**

When no power has been reserved by the *wakif* in the deed of *wakf* to make any change in the terms of the *wakf* or in the personnel of the *Mutwalli*, no such change can be made by him after the *wakf* has been completed. (*King C. J. & Zia-Ul Hossan J.*)

RAHIMAN vs. BAQRIDAN.

1936 O.W.N. 165 180 I.C. 495 = A.I.R.
1936 Oudh 213.

Wakf—Limitations upon the powers of the mutwali.

The *mutwali* of a *wakf* is in a position other than that of a *mohunt* of Hindu math who appears to have the power of pledging the credit of the math not merely to preserve it from loss or destruction but for the carrying on of the daily ordinary objects for which the math was founded; the carrying out of the objects of the trust is not a purpose for which a *mutwali* may bind a *wakf* property. (*Courtney Terrel, C. J. & Verma J.*)

MAHABIR PROSAD MARWARI vs. MOHAMMAD YEHIA.

15 Pat. 88 = 17 P.L.T. 393 = 183 I.C.
869 = A.I.R. 1936 Pat. 390.

wakf—Shia law—Power of mutwali to usufructually mortgage wakf property—sanction of the court, at what stage must be obtained.

Under the Shia Law, a *mutwali* may obtain the sanction of the court for executing a usufructuary mortgage of the *wakf* property for the purpose of discharging pre-existing encumbrances or for otherwise benefitting or preserving the *wakf*. Where the previous sanction of the Court has not been obtained, the mortgage is not void *ab initio*, for the Court can subsequently grant the requisite sanction with retrospective effect. (*Bennet & Bajpai JJ.*)

AFZAL HUSSAIN vs. CHHEDI LAL & ORS.

57 All. 727.

Mohamedan Law—(Contd.)

Wakf—Mutwali when may grant permanent lease of wakf property—Such lease if valid against grantor thereof.

Under the Mahomedan Law, a *Mutwali* can not grant a permanent lease of *wakf* property in the absence of express authority in the *wakf* deed or leave of the Court obtained for the purpose. Such leave must be obtained from the District Judge; leave of a *Munsiff*, for a suit pending before him if compromised is not sufficient to validate a permanent lease granted by the *Mutwali* by the terms of such compromise. Such a lease being wholly invalid cannot be enforced even against the persons granting it. (*Edgely JJ.*)

ABDUL RAHAMAN MOLLA vs. ABDUL HOSSAIN MOLLA & ORS.

43 C.W.N. 585.

Wakf—Mutwali granting permanent lease if bound for life-time thereby or may eject transferee from leasee treating tenancy as ordinary occupancy one.

A permanent lease of *wakf* property granted by a *mutwali* is valid against him during his lifetime and he cannot repudiate the lease and eject a transferee from the lessee on the footing that it is an ordinary occupancy tenancy. (*M. C. Ghosh J.*)

ARSHAD HOSSAIN vs. NARESH NANDINI DASSI.

40 C.W.N. 584

wakf—Wakf founded for the perpetuation of a religious establishment—Duty of Mutwali.

Where the trust is of the class known as *wakf* and of the variety founded for the perpetuation of a religious establishment based on the personality of some deceased saint, the duty of the *mutwali* extends to the performances of religious observances and he is also the religious superior of the establishment. Such a *mutwali* is called *Sajjadanashin*. The *Sajjadana-hin* can only be chosen from among the saints, descendants and he is under an obligation in addition to his duties as *mutwali* to carry on

Mahomedan Law—(Contd.)

the religious ceremonials. But in the matter of trust funds he is in no better position than that of any other Mutwali. He may borrow money and incur debts for the preservation of trust properties but even then only with the sanction of the Kazi (whose modern representative is the District Judge) and the Kazi may authorise him to create an incumbrance upon the Wakf property, if the income from the property should decline, he must cut down the payments to beneficiaries. He cannot pay dividends out of capital and in no case may he mortgage the capital to pay off the loan without the consent of the Kazi. (*Courtney Terrell, C. J. & Varma J.*)

MAHAJIR PRASAD MARWARI vs. MOHAMMAD YEHIA.

15 Pat. 88 = 17 P.L.T. 393 = 163 I.C. 969 = A.I.R. 1936 Pat. 390.

Wakf—*Setting up personal title to wakf property, is a proper ground for removal of mutwali.*

It is not a sufficient ground for removal of a Mutwali from his office that he is setting up a title to the Wakf property as his personal estate. It is only when in addition there is ample proof as to breach of trust and neglect of duty on the part of the Mutwalli, that he is liable to be removed. (*Guha & Bartley JJ.*)

NEWAZ AHMED KHAN vs. HASAMAT-DIN AHMED.

A.I.R. 1936 Cal. 262 162 I.C. 762.

Wakf *Decree declaring person to be a Mutwali, if capable of execution,*

A declaratory decree to the effect that a person is a Mutwali is incapable of execution. A Mutwali entitled to get the property under a declaratory decree cannot apply under Sec. 144, C. P. Code for restitution of the property in question (*Bhide J.*)

FATEH MOHAMMAD vs. SIRDAR ALI SHAH.

[A.I.R. 1936 Lah. 48 = 161 I.C. 444.

Mahomedan Law—(Contd.)

Will—*Extent to which property may be bequeathed to a person other than an heir.*

Under the Mahomedan Law, a person can bequeath one third of his estate to one who is not an heir. He has no power to leave more than one third of his estate to persons who are not heirs or to leave property to his heirs so to confer on any one heir a larger fraction than that to which he is entitled by law. Such disposition however, may be validated by the consent of the heirs. (*Pollock A. J. C.*)

MST. SUBHANBI vs. MST. UMRAOBI.

31 N.L.R. (Supp.) 160 = 19 N.L.J. 53 = 161 I.C. 719 = A.I.R. 1936 Nag. 113.

Will—*Bequest to A for life and after his death to B—nature of estate conferred on A.*

Under the Mahomedan Law, a bequest to A for his life and after his death to B, confers a life estate only upon A. (*Pollock A. J. C.*)

MST. SUBHANI vs. MST. UMRAOBI

31 N.L.R. 160 = 19 N.L.J. 53 = 161 I.C. 719 = A.I.R. 1936 Nag. 113.

will—*by Mahomedan in favour of his wife—construction.*

A will executed by a Mahomedan in favour of his wife contained the following terms: "You shall as owner enjoy during your lifetime the properties described in the Schedule below. No one shall make any claims to the said properties during your lifetime or get a share in them or any profits or income arising out of them. My sons shall not get any share or income of the aforesaid movable or immovable properties during your lifetime; they shall get immovable properties, due shares in them, after your death according to Mahomedan Law. Whatever income the properties may yield shall remain in your custody. You shall be entitled to spend the whole amount of the said income according to your will and discretion and no one shall be entitled to demand any account of it from you".

Mahomedan Law—(Contd.)

Held, that by the terms of the will and apart from any rule of Mahamedan Law, only a life estate was conferred upon the wife. (*M. C. Ghosh & R. C. Mitter JJ.*)

ABDUL KHALEQUE MONDOL *vs.* BEPIN BEHARI BOSE.

A.I.R. 7936 Cal. 456.

MAJORITY ACT (IX OF 1875)

Sec. 2 (a)—"Capacity to act in matter of marriage"—meaning of,

The expression capacity to act in the matter of marriage means the capacity to be a party to a void marriage and relates to the acts of the parties by which their status is changed. The expression does not refer and is not applicable to presumption to contract a marriage in future. 80 I. C. 914 relied on. (*Page C. J. & Mya Bu, Baguley Mosely Ba U JJ.*)

MAUNG TUN AUNG *vs.* MA. E. KYI,

14 Rang. 215 = A.I.R. 1036 Rang. 212 = 162 I.C. 560.

MALABAR TENANCY ACT (XIV OF 1930)

Secs. 22 & 23 (a)—*Melcharthdar not entitled to collect rent, if landlord—Jenmi if included in the expression "landlord"—Notice to him of application under Sec. 22, whether necessary.*

Sec 3(o), Malabar Tenancy Act defines a landlord as the person under whom a tenant holds and to whom he is liable to pay rent or michavaram and includes a jenmi. Therefore where a Jenmi executes a Melcharth which contains any provisions enabling the Melcharthdar to collect rent from the original tenant, the Melcharthdar cannot in any sense be regarded as a landlord. The Jenmi must be taken to be the landlord for all purposes and he should be given notice of an application under Sec. 22. (*Varadachariar & Stodart JJ.*)

NETHALIA SEQUERIA *vs.* CHOVAKARAN ABDUL KHADER & ORS.

59 Mad. 419,

MASTER AND SERVANT.

Monthly servant whose services terminated on a month's notice, if can be said to have been dismissed.

A person who was engaged on the footing of a monthly servant and whose services are terminated on a month's notice can only be held to have been discharged from service and not dismissed or removed. Therefore he is not entitled to bring a suit for damages for wrongful dismissal. (*Dalip Singh & Bhide JJ.*)

SECRETARY OF STATE *vs.* RAM LAL KOHLI.

38 P.L.R. 1058 = A.I.R. 1936 Lah. 663 = 165 I.C. 353.

Power of Government to dismiss its servants - action for damages when maintainable.

The general rule is that a Government servant holds office during pleasure and is liable to be dismissed at any time without notice and without reasons assigned. The rule may be subject to exceptions but they must be statutory exceptions, and in this country apparently they must be contained in rules under the Government of India Act, for instance, the fundamental rules governing the employment of civil servants. Further, it is for the plaintiff, who claims damages for breach of contract, to prove such statutory exceptions; if the general rule applies, then dismissal cannot give rise to an action for damages. 27 Bom. 189; 33 Cal. 669 & 57 Cal. 231 followed. (*Broomfield & Macklin JJ.*)

SECRETARY OF STATE *vs.* YADAVGIR GURU DHARANGIR.

60 Bom. 42.

Master as agent of Bank fraudulently enabling his servant to get a loan from the Bank—servant becoming bankrupt and unable to repay the loan—liability of the master

The defendant who was the agent of a Bank, fraudulently supported an application for loan made by his servant. The defendant was aware that the statements made in the application were untrue and that the loan was in reality taken for the benefit of

Master and Servant—(Contd.)

the defendant's firm. When the Bank sued the debtor for the recovery of the loan, the latter applied for insolvency and was adjudicated a bankrupt. The Bank thereupon sued the defendant who denied liability. *Held*, that as the defendant had acted dishonestly in sanctioning the application for loan, made by his servant, he was liable for the fraud committed by him. (*Coldstream & Jai Lal JJ.*)

PEOPLES BANK OF NORTHERN INDIA
vs. HARGOPAL.

17 Lah. 262 = 38 P.L.T. 526 = A.I.R.
1936 Lah. 268 = 182 I.C. 204.

MINOR.

Decree against minor declared null and void in subsequent suit brought by minor on attaining majority—Court, if has jurisdiction to revive first suit.

When a decree passed against a minor is declared null and void in a subsequent suit brought by the minors for such a declaration on the ground that the minors had not been represented by a properly appointed guardian-ad litem in the first suit the Court which dealt with the first suit has jurisdiction to revive it as against the minors. (*Cruha & Bartley JJ.*)

MONMOHINI DAS, PURKAYASTHA vs.
BEHARI LAL SAHA.

40 C.W.N. 1135 = A.I.R. 1936 Cal. 421

Suit against minor through mother as next friend—Mother does not contest—Suit contested adequately by uncle who was co-defendant—Right of minor to set aside decree.

A suit for possession of a tank was brought against two minors represented by their mother as the natural guardian and also against their uncle who was living in joint mess with them. The mother did not choose to defend the suit. But the defence was adequately conducted by the Minor's uncle. *Held*, that the defect in the representation of the minors did not affect the merits of the case, and the Judge was right to hold that the minor plaintiffs were not entitled to set aside the decree passed

Minor—(Contd.)

against them during their minority. 16 Cal. 40 (P. C.) relied on. (*M. C. Ghosh J.*)

PRAFULLA KUMAR SEN GUPTA vs.
BEHARILAL SEN GUPTA.

A.I.R. 1936 Cal. 247, = 182 I.C. 804.

Suit against minor defendant—sale of property belonging to minor by court auction—Negligence on the part of minor's guardian—sale if may be set aside

A judicial sale cannot be held a nullity unless the court lacked jurisdiction to make the sale. A minor however can avoid the sale on the ground of gross negligence on the part of his guardian. If however a suit is brought to set aside a sale on the ground of fraud and collusion of the minor's guardian but evidence comes to show that there was no fraud nor collusion but only negligence, the sale cannot be set aside. (*Rowlson J.*)

BHAGLU MARHO vs. RAMANTAR SHAH.

17 P.L.T. 832 = 164 I.C. 178 = A.I.R.
1936 Pat. 442.

MORTGAGE.

Accounts—Liability of usufructuary mortgagee to account.

The liability to account of a mortgagee in possession depends entirely upon whether under the contract he has to hand over from time to time anything of the rents and profits to the mortgagor. For such money he is a trustee for the mortgagor until it is paid over. In cases where only a portion, fixed or proportionate of such rents and profits is to be retained by way of interest, the liability to account is clear. Similarly where the whole of the rents and profits are retained in reduction of a fixed rate of interest and the mortgagor must pay the balance of the fixed rate from some other source, it is clearly necessary to account, because the mortgagee is in possession and the mortgagor cannot otherwise know how much excess he may have from time to time to pay. And by virtue of his liability to account from time to time he must if on any particular occasion he retains some of

Mortgage—(Contd.)

the mortgagor's money, apply it to the reduction of capital. Where however he is entitled to retain the whole of the rents and profits and where his liability to make the stipulated payments to or on behalf of the mortgagor is independent of the amount of such rents and profits as he may in fact receive from the property, there can be no reason to call upon him to account. The failure to pay over the stipulated amount to the mortgagor is the failure of a debtor and not the failure of a trustee, to account satisfactorily for the property of another, and there is no reason to hold him liable to account with yearly rests or to apply the sum which he annually fails to pay in reduction of the capital of the loan. (*Courtney Terrel C, J. & Dhavle J.*)

MOHAMMED SADIO vs. HARAKH NARAIN.

17 P.L.T. 684 = A.I.R. 1936 Pat. 583.

Agreement to mortgage *Contract to advance money on mortgage, if can be enforced by a suit for specific performance—Balance of mortgage consideration, if can be attached in execution of a decree.*

A contract to advance money on a mortgage cannot be specifically enforced and the unpaid consideration cannot be attached in execution of a decree. The mortgagor has a remedy in a suit for damages. (*Addison & Din Mohammad JJ.*)

SEWA SINGH vs. MILKHA SINGH.

17 Lah. 270 = 38 P.L.R. 574 184 - I.C. 582 = A.I.R. 1936 Lah. 727.

Charge—Borrower covenanting not to transfer certain property, during pendency of loan if amounts to mortgage-difference between mortgage and charge.

In order to constitute mortgage there must be transfer of an interest of the mortgagor in the property sought to be mortgaged. The covenant against alienation does no more than offer an assurance to the person advancing the money that there will be property available for the realisation of a simple money-debt, in the event of his being driven to obtain one. It divests

Mortgage—(Contd.)

the executant of a portion of his interest in the property, but does not vest that interest in anyone else. Where by a document a security is created, with a covenant not to alienate the property until the debt is repaid but without any clause from which an inference may be made that there was no transfer of an interest in the property, the document amounts to a charge. Between a mortgage and a charge, the charge if created earlier has a priority over the mortgage, but only when the mortgagee has notice of the charge. (*Tek Chand & Dalip Singh JJ.*)

VIR BHAN vs. SALIG RAM.

38 P.L.R. 1078 - 17 Lah. 659 = 164 I.C. 381.

Co mortgagor—Non-receipt of any part of the consideration money, if a ground of exemption from liability.

When a person grants along with another a mortgage which is for the benefit of the latter, and undertakes joint liabilities for the mortgage debts, he is bound by the mortgage, although he may have received no part of the consideration money, and the entire amount has been received by the other mortgagor. (*Guha & Khundhar JJ.*)

SM. ANNAMOYI DASSI vs. UMESH CHANDRA GHOSH.

40. C.W.N. 339

Equitable mortgage—deposit of jamabandi or title deed, if can constitute equitable mortgage.

The deposit of a copy of the jamabandi or a copy of a title deed, is not sufficient to constitute an equitable mortgage. (*Dalip Singh & Bhide JJ.*)

PUNJAB & SIND BANK, LTD., LYALLPUR vs. GANESH DAS NATHU RAM & ORS.

16 Lah. 1113 = 38 P.L.R. 145 = 161 I.C. 429.

Equitable mortgage—if created by deposit of copy of a sale deed.

Mortgage—(Contd.)

A deposit of a copy of sale deed does not create a valid equitable mortgage when there is no evidence to show that the original sale deed is lost or is not then available to the depositor. (*Dalip Singh & Bhide JJ.*)

PUNJAB & SIND BANK, LTD., LYALLPUR vs. GANESH DAS NATHU RAM.

16 Lah. 1113 = 38 P.L.R. 145 = 161 I.C. 429.

Interest—Part of principal money payable to another by mortgagee immediately not paid till sometime later—Date from which interest accrues on such money.

Under a mortgage deed, part of the mortgage money was payable to a third person by the mortgagee. Owing to unexpected circumstances the payment was not made immediately but at a considerably later date. Held that such money could not be deemed to have been paid to the mortgagor at the time of the execution of the mortgage nor could the mortgagee be considered as the agent of the mortgagor in respect of payment of such money to another, and as such, the mortgagee was entitled to claim interest not from the date of the mortgage but only from the date of actual payment by him. (*Tekchand & Din Mohammed, JJ.*)

HIRALAL & ORS. vs. KHIZAR HAYAT KHAN.

A.I.R. 1936 Lah. 169 = 161 I.C. 251.

Mortgage decree—Preliminary decree passed against Mohunt—Mohunt relinquishing rights in favour of another—power of the Court to make the decree final.

Where after a preliminary mortgage decree had been passed against a Mohunt and several others, the Mohunt abdicated in favour of his successor without informing the Court or the decree-holder, held, that it was not necessary for the decree-holder to make the successor Mohunt a party to the proceeding before the passing of the final decree, and his failure to do so did not render the final decree a nullity and

Mortgage—(Contd.)

incapable of execution. (*Fazl Ali & Luby JJ.*)

HARIHAR GIR vs. KARU LAL.

15 Pat. 64 = 17 P.L.T. 83.

Mortgage decree—Mortgage decree passed by High Court—land situate outside jurisdiction—suit by mortgagor to declare mortgage decree void dismissed—application by mortgagee for personal decree for balance, if maintainable.

A final decree in a mortgage suit for sale of the mortgaged properties having been passed by the High Court in its Original Side, by consent of the parties, the decree was transferred for execution to the District Court, within whose jurisdiction the property was situated. The property was duly sold, but the amount was not sufficient to cover the whole decretal amount. After the sale, the mortgagor filed a suit for a declaration that the preliminary and final mortgage decrees in the High Court were null and void, as the property being situate outside the jurisdiction of the High Court, that court had no inherent jurisdiction to entertain such a mortgage suit. This suit was dismissed. Thereupon the mortgagee applied in the High Court for a personal decree against the mortgagor for the balance due under his mortgage decree. The mortgagor objected that the High Court had no inherent jurisdiction to entertain the mortgage suit, and therefore had no jurisdiction to pass any personal decree against the mortgagor. Held, that the objection was not maintainable, because the mortgage decree, not having been set aside in proceedings by way of appeal, revision, review or otherwise, could not be treated as a nullity and must be deemed to be subsisting between the parties and therefore binding and conclusive against them. 9 Rang. 480 followed. (*Page C. J. Mya Bu & Dunkley JJ.*)

BANK OF CHETTINAD vs. CHETTYAR FIRM OF S. P. K. P. V. R. & ANR.

14 Rang. 94 = 161 I.C. 989 = A.I.R. 1936 All. 722.

Mortgage—Prior mortgagee joined as party in suit on subsequent mortgage not

Mortgage—(Contd.)

objecting and offering evidence in support of his title—jurisdiction of the Court to decide matters raised in the suit.

Although a prior mortgage is not a necessary party to a suit on a subsequent mortgage, yet when he has been so made a party and he raises no objection and does not object to the issues framed by the Court as to the genuineness or otherwise of his mortgage, but on the contrary accepts the issues and offers evidence in support of his title as mortgagee, he cannot after the issues have been decided against him, contend he was not party in the suit. (*Mackney J.*)

LADI PITAKA ASSOCIATION vs. MAUNG PO THWE.

A.I.R. 1936 Reng. 340.

Mortgage suit—Suit on basis of puisne mortgage—Subsequent mortgagee also possessing prior mortgagee rights professedly impleaded as subsequent transferee—Validity of prior mortgage admitted in plaint—Prior mortgagee rights if of necessity to be set up in such a suit.

Under Expl. to Or 34, r. 1, C. P. Code, it is not necessary for a puisne mortgagee to implead a prior mortgagee, and he may without impugning such a mortgage claim to sell the property subject to it. A person who has taken a subsequent mortgage and also possesses prior mortgagee's rights has a dual capacity. He is a necessary party in his capacity as a subsequent transferee but not a necessary party in his capacity as a prior mortgagee. If therefore the validity of the prior mortgage is admitted in the plaint in puisne mortgage and he has been professedly impleaded as a subsequent transferee, there is no reason that he must of necessity appear in Court and set up rights under the prior mortgage which is not disputed by the plaintiffs. His failure to set up his prior mortgagee rights in such a suit would not be a bar to his subsequent suit for declaration that he had the rights of a prior mortgagee on account of his discharge of the prior mortgage deed. (*Sullaiman C. J. Bennet & Harris JJ.*)

RAMDHAN vs CHUNNI KUNWAR.

1936 A.L.J. 774=1936 A.W.R. 653=
A.I.R. 1936 All. 578 165.

Mortgage—(Contd.)

Mortgage Suit—Property not mortgaged included in sale notification and sold—Knowledge and abstention of mortgagor to rectify notification of sale—effect of.

Where a sale proclamation and notice have been settled in a manner so as to include properties not included in the mortgage and the judgment debtor with full knowledge allows such properties to be sold an objection by the judgment debtor subsequently that the whole proceeding has been vitiated and therefore the sale ought to be set aside ought not to be allowed. 12 Mad. 19 relied on. (*Derbyshire C. J. & Costello, J.*)

SARADA CAHRAN GOHO vs. PRATIVA SUNDARI DEVI.

40 C.W.N. 428.

Mortgage Suit—Suit setting aside sale in execution Receiver of the property, if a necessary party.

In a suit for a declaration that a sale held by the Registrar was not binding and for having it set aside on the ground that the mortgagee who is himself the purchaser wrongfully and fraudulently caused to be sold properties which were not included in the mortgage, it is desirable if not essential, that the Receiver who was the mortgagor, should be made a party. (*Derbyshire C. J. & Costello, J.*)

SARADA CHARAN GOHO vs. PRATIVA SUNDARI DEVI.

40 C.W.N. 429.

Mortgage Suit—Court permitting shebait to mortgage trust properties—mortgage, if can be challenged on the ground of want of legal necessity or a defect in the procedure adopted in obtaining the order.

An order of the Court granting permission to a trustee or Shebait to mortgage trust or Debutter property on the ground of legal necessity can be relied upon by the mortgagee as prima facie evidence of his having made due and proper enquiry as to the necessity. The fact that the procedure adopted in obtaining the order of the Court

Mortgage—(Contd.)

was defective or that the Court in making the order wrongly exercised its jurisdiction, cannot be proper reasons for challenging the validity of the mortgage. (*Ammer Ali J.*)

PASHUPATINATH SEAL vs. PRADUMNA KR. MALLICK.

63 Cal. 454.

Mortgage Suit—Transaction replacing mortgage frustrated—mortgagee if can fall back on earlier mortgage and sue on it as plaintiff.

Five brothers executed a mortgage in respect of their shares, and subsequently three of them entered into an agreement with the mortgagee to sell their shares to him. Ultimately however all the brothers having sold their shares to the plaintiff, the mortgagee sued for specific performance of his agreement impleading the plaintiff as a defendant in the suit, and obtained a decree. The plaintiff thereupon sued the mortgagee for partition and possession of the shares of the two brothers who were not parties to the agreement to sell their shares to the mortgagee and in such suit sought to rely on the original mortgage for the purpose of identifying the other three shares. *Heid*, that the plaintiff was entitled to do so. 39 All 178 explained; 69 M. L. J. 819 & 1922 All. 76 distinguished. (*Ramesam & Stone JJ.*)

POLAYYA DORA vs. ANANTHA PATRO.

59 Mad. 44 = A.I.R. 1936 Mad. 61 = 160 I.C. 757.

Mortgage Suit—Mortgagee purchasing mortgaged property in Court auction, failing to obtain possession on account of obstruction by prior purchaser of equity of redemption fact of prior purchase unknown to mortgagee—suit by mortgagee against such prior purchaser for recovery of possession—date of commencement of limitation.

A mortgagee decreeholder purchased the mortgaged property in execution of his decree, but his attempt to obtain possession of the same was resisted by a person who

Mortgage—(Contd.)

claimed to be a purchaser of the property as a sub-mortgage. The fact of this purchase was unknown to the mortgagee until he was obstructed. The mortgagee thereupon brought a suit against the prior purchaser, who contested the same on the ground that as it was brought more than 12 years after the money on the mortgage became due, it was barred by time. *Heid*, that the suit by the mortgagee against the purchaser of the equity of redemption was based not on the mortgage, but on his rights as a purchaser, and the cause of action for such arose when his possession was obstructed by the prior purchaser. But as the purchaser of the equity of redemption had right to redeem the property, the mortgagee was bound to give him a chance to do so. (*Ramesam & Stone JJ.*)

SAMBASIVA AYYR vs. SUBRAMANIA PILLAI.

59 Mad. 312 = 44 M.L.W. 887 = A.I.R. 1936 Mad. 70.

Mortgage Suit—Suit by person having some interest in the mortgaged property as mortgagee—all other persons interested in the mortgage if must be joined as plaintiffs.

There is nothing in law which disentitles a person who has some interest in the mortgage as mortgagee to get a decree when all those persons who can possibly have an interest in the mortgage are before the Court. What the law requires is that all the persons interested in a mortgage must be parties to the suit, but it does not lay down that all of them should be arrayed on the same side. In other words, the law does not require that all the mortgage must be plaintiffs. If this were so, the mortgagor could easily arrange matters with one of the mortgagees whose share was very small and induce him not to join in the suit and thereby defeat the interest of the remaining mortgagees. (*Khaja Mohammed Noor J.*)

JAMNA DAS BISREWAR LAL vs. MANI RAM HALWAL.

162 I.C. 15 = A.I.R. 1936 Pat. 439

Possession—Claim for possession on the basis of a valid sale deed—person in pos-

Mortgage—(Contd.)

session without valid title but had paid off a prior simple mortgage such payment if can be set up as shield against claim for possession.

In a suit for declaration of title and recovery of possession of property, it was found that the defendant was aware of the previous contract in favour of the plaintiff, though registered subsequently, must prevail as against the sale deed in favour of the defendant. The defendant, however, contended that the plaintiff should not be given a decree for possession unless and until he paid the amount which the defendant had paid in discharge of a prior simple mortgage. *Held*, that whatever rights the defendant acquired by paying off the prior simple mortgage, he could enforce in proper proceedings taken for the purpose, but he was not entitled to use such payment as a shield and resist the plaintiff's claim for possession until he had been paid such amount. 48 All. 443 distinguished. (*Sulaiman C. J. & Bennet J.*)

CHOTEY LAL vs. SUDHERSHAN.

1936 A.L.J. 1176 = 1936 A.W.R. 1128

Puisne mortgagee—Personal decree against puisne mortgagee—if valid—whether may be questioned in execution.

In a mortgage suit, in which puisne mortgagees were made defendants, a personal decree was passed making the puisne mortgages liable. In execution, the puisne mortgagees objected stating that there was no decree capable of execution against them.

Held, the objection was maintainable under Sec. 47. (*Muhammed Noor & Rowland JJ.*)

BILAT ROUT vs. MAHBUB SAFI.

A.W.R. 1936 Pat. 303 = 162 I.C. 867.

Recitals—Onus of proving that statements in mortgage deed were untrue, on whom lies.

Where a mortgage deed recited that the land mortgaged was the property of mortgagors who were not members of an agricultural tribe, and subsequently on a suit being brought on basis of the mort-

Mortgage—(Contd.)

gage, the mortgagor claimed that he had no proprietary right in the land on the date of the mortgage and that they belonged to an agricultural tribe, *held*, that the onus was on the mortgagors to show that the recitals made in the mortgage deed were untrue. (*Coldstream & Abdul Rashid JJ.*)

ALI MOHAMMAD vs. SANT LAL.

A.I.R. 1936 Lah. 60 = 163 I.C. 406.

Redemption—Mortgage for a term of 60 years—mortgagor, if entitled to sue for redemption before the expiry of the stipulated period.

A mortgagor who has executed a mortgage for a term of 60 years is not entitled to sue for redemption before the expiry of the term where the mortgagee has done nothing to cause any permanent injury to the property mortgaged, but has on the contrary improved the value of the property 34 All. 659 & 2 Luck. 279 distinguished. (*King C. J. & Nanavutty J.*)

HAR BUX SINGH vs. MAHARIR SINGH.

1936 O.W.N. 61 = 159 I.C. 1052 = A.I.R. 1936 Oudh. 130.

Redemption—Principal money payable by mortgagee immediately—mortgage to be redeemed within 20 years—Date from which the period should be calculated.

A mortgage deed provided that the principal money sought to be paid by the mortgagee forthwith to another person and the deed also provided for redemption within 20 years. Owing to unexpected events, however, the payment by the mortgagee was not made immediately but on a later date. *Held*, that the right to redemption accrued 20 years from the date of the mortgage. (*Teckchand & Din Mohammed JJ.*)

HIRALAL & ORS. vs. KHIZAR HAYAT KHAN.

A.I.R. 1936 Lah. 188 = 161 I.C. 251.

Redemption—Deposit of mortgage dues in Court—Court if may declare mortgage

Mortgage—(Contd.)

redeemed and also allow mortgagee to remain in possession for some further time—Such decision, if resjudicatu so as to bar subsequent suit for mesne profits.

The court possessing as it does jurisdiction to settle the account between the parties in a mortgage suit, does not violate any provision of law in holding a mortgage to have been redeemed by a deposit and notice, and at the same time allowing the mortgagee to remain in possession for some further time and appropriate the profits. Even if such decision be erroneous, it is resjudicata between the parties and would bar the mortgagor from claiming mesne profits for the period concerned by a subsequent suit. (*R. C. Mitter J.*)

RAJMOHAN DAS vs. SARODA MOBAN CHOWDHURY.

40 C.W.N. 627 = 162 I.C. 709 = A.I.R. 1936 Cal 200.

Redemption—Purchaser of Equity of Redemption, how far affected by suit to which he is not a party.

The purchaser of the Equity of Redemption has the rights which his mortgagor had, namely, to have the option of retaining the property on payment of the mortgage debt. That right cannot be affected by a suit to which he is not a party; but apart from that he is in no better possession than a trespasser. (*Ramesam & Stone JJ.*)

SAMBASIVA AYYAR vs. SUBHAMANIA PILLAI & ORS.

59 Mad. 312 = 44 M.L.W. 887 = A.I.R. 1936 Mad. 70.

Redemption—Holding usufructually mortgaged, purchased by landlord in execution of his rent decree—subsequent purchase by the mortgagee from the landlord—suit for redemption, if lies.

A mortgagee in possession having made defaults in payment of rents, the holding was brought to sale by the landlord in execution of a rent decree obtained by him and purchased by the landlord himself. The mortgagee thereupon sued for a declaration

Mortgage—(Contd.)

of his rights as a mortgagee which suit was decreed in pursuance of a compromise decree between the mortgagee and a person to whom the equity of redemption had in the meantime passed. Subsequently the holding was repurchased by the original mortgagee. Later a person to whom the equity of redemption had been sold by the mortgagor sued to redeem the mortgage. *Held*, that the rent sale by the landlord had extinguished the mortgagor's right of redemption, and the liability of redemption could not re-attach to the land again. (*Wort A. C. J. & Dhaule J.*)

GAURI SHANKER vs. SHEOTAHAL GIR.

17 P.L.T. 531 = A.I.R. 1936 Pat. 434 = 164 I.C. 213.

Redemption—Usufructuary mortgage—provision for payment of certain sum annually by mortgagee to mortgagor—amount not paid—subsequent suit for redemption—deduction of amount not paid by mortgagee with interest thereon, if can be claimed.

An usufructuary mortgage deed provided for the payment of a certain sum by the mortgagee to the mortgagor annually. The amount was not paid according to the stipulation. Subsequently the mortgagor sued for redemption and claimed deduction of the amount not paid by the mortgagee with interest thereon. *Held*, that the amount in default by the mortgagee was not to be regarded as a mere series of debts arising out of failure to pay agreed sums. It arose out of a single contract of which the principal ingredient was a mortgage and was to be treated on equitable principles. Overdue payments from the earliest period of the contract could not, in taking accounts in a redemption suit, be treated as statute barred. The Court had in such circumstances the right in equity to allow simple interest on such overdue amounts. (*Courtney Terrel C. J. & Dhaule J.*)

MUHAMMED SADIQ vs. HARAKH NARAIN.

17 P.L.T. 684 = A.I.R. 1936 Pat. 583.

Mortgage—(Contd.)

Rights of mortgagor—Tender of mortgage dues or deposit thereof refused by mortgagee—Mortgagee remaining in possession after such refusal, if can be treated as a trespasser.

After a tender or deposit has been refused, the mortgagee does not by reason of such refusal become a trespasser from the moment of the tender or receipt of the notice of deposit. The relationship of mortgagor and mortgagee subsists and the mortgagee cannot claim mesne profits merely on the basis of tender or deposit. (*R. C. Mitter J.*)

RAJMOHAN DAS vs. SARODA MOHAN CHOWDHURY.

40 C.W.N. 627 = 162 I.C. 709 = A.I.R. 1936 Cal. 200.

Rights of mortgagor—Tender or deposit of mortgage dues refused, by mortgagee—Remedy of mortgagor—Suit by him if must include whole account between parties—Omission to claim mesne profits in such suit—Effect of.

Where a tender of the mortgage dues or a deposit thereof under Sec. 83 of the T. P. Act is not accepted by the mortgagee, the mortgagor has to bring a suit for redemption and in such suit bring in the entire account between the parties including a claim for excess profits received by the mortgagee when the latter is in possession. If the mortgagor does not include such claim in his redemption suit, he would be debarred from bringing a subsequent suit for mesne profits by Sec. 11, Expt. iv of Or. 2, r. 2 of the C. P. Code. (*R. C. Mitter J.*)

RAJMOHAN DAS vs. SARODA MOHAN CHOWDHURY.

40 C.W.N. 627 = 162 I.C. 709 = A.I.R. 1936 Cal. 200.

Rights of mortgagor—Money left with mortgagee to discharge earlier mortgage—mortgagee's failure to discharge liability—suit for damages, if maintainable by mortgagor.

Where money has been left with a vendee or mortgagee in order to discharge some earlier mortgage, and such vendee or mortgagee fails to discharge the liability,

Mortgage—(Contd.)

a cause of action for damages arises immediately, and the vendor or mortgagor need not wait until the property is actually sold or until he is sued, or a decree passed against him before bringing a suit for damages. In other words, even before an injury has been done or damage has actually taken place, the mortgagor is entitled to call upon the mortgagee to place him in a position to meet his liability which the has under taken. (*Harries & Bachhpal Singh JJ*)

ABDUL MAJEED vs. ABDUL RASHID.

1936 A.W.R. 773 = 1936 A.L.J. 910
164 I.C. 665 = A.J.R. 1936 All. 593.

Rights of mortgagor—Mortgage of certain area in common holding—Rights of mortgagee to claim possession.

When a certain area out of a common holding is mortgaged with possession but it is not absolutely certain whether in case of a partition the mortgagor would be entitled to receive the particular portion mortgaged, the mortgagee can only claim an undivided share in the area which belongs to the mortgagor. (*Agha Haidar J.*)

BACHNA & ANR. vs. BACHAN SINGH & ANR.

38 P.L.R. 566.

Rights of mortgagee—Mortgagee in possession deprived of part of the property by third party claiming under purchase from mortgagor—Remedy of the mortgagee.

Where a mortgagee entitled to possession under a usufructuary mortgage has been put in possession by the mortgagor but is afterwards deprived of it by a third party claiming under a purchase from the mortgagor, the mortgagee's right is only to sue to recover the possession of which he has been deprived. He cannot sue for the mortgage money unless the dispossession was owing to the wrongful act or default of the mortgagor. (*Mosely & Ba U, JJ.*)

MA PWA THEIN vs. MA ME THA.

A.I.R. 1936 Rang. 80 = 161 I.C. 481.

Mortgage—(Contd.)

Right of mortgagee—Mortgage by way of conditional sale together with lease for specified term by mortgagee to mortgagor—latter holding over—suit for rent for period of holding over, if maintainable

Where there are a mortgage by way of conditional sale, without any express stipulation for interest and a lease for a specified term from the mortgagee to the mortgagor taken on the same day, and the mortgagor holds over, a suit for a rent for period of such holding over brought while no suit has yet been instituted on the mortgage, is maintainable whether it be taken as really a suit for interest on the mortgage or a suit for rent based on the relationship of landlord and tenant. 30 C. W. N. 670 & 55 Cal. 101 distinguished. (*R. C. Mitter J.*)

ABDUL MANNAN MIAN vs. KALAI KHAN,

40 C.W.N. 343.

Rights of mortgagee—Area mentioned in mortgage deed—proportionate rent mentioned—mortgagee, if entitled to claim larger quantity of land, according to the proportion of rent.

The defendant mortgaged 12 bighas of land out of 15 bighas held by him at a rent of Rs. 10-9-3. The mortgage bond stated that the proportionate rent of the portion mortgaged would be Rs. 8-7. Subsequently it having transpired that the defendant's holding consisted of 25 bighas according to the cadastral survey, the plaintiff claimed that he would be entitled to a mortgage of $\frac{4}{5}$ ths of 25 bighas, inasmuch as the rent of the mortgaged portion was Rs. 8-7, while the rent of the whole portion was Rs. 10-9. Held, that it was not correct as between a debtor and a creditor to give the creditor a larger portion than what was mortgaged to him just because of the proportion of rent. (*M. C. Ghose J.*)

DEKHIRAM MADHU vs. RAM LAKSHMI FALIA ANR,

62 C.L.J. 426 = A.I.R. 1936 Cal. 780.

Mortgage—(Contd.)

Subrogation—Third mortgagee being apprised of one mortgage only redeems the same with part of consideration of his mortgage.—His right of subrogation against a second mortgagee.

A certain property which had been mortgaged to two different persons was later mortgaged again to a third person. The mortgagor gave the third mortgagee to understand that there was only one mortgage and the third mortgagee redeemed that mortgage with a part of the consideration of his mortgage and obtained that mortgage bond without notice of an intermediate mortgage which existed. In a suit by the intermediate mortgagee on his mortgage, held, that the third mortgage must be presumed to have intended to keep the prior mortgage alive as a shield against any intermediate mortgagee who might be discovered later and was entitled to be subrogated to the rights of the first mortgagee, whose mortgage he had redeemed. The second mortgagee bringing a suit on his mortgage was therefore bound to pay the third mortgagee the amount paid by him in redeeming the first mortgage before the second mortgagee could satisfy his own mortgage out of the mortgaged property. (*M. C. Ghose, J.*)

RAJANI NATH SEAL vs. ENNAT ALI HAWLADAR.

A.I.R. 1936 Cal. 313

Usufructuary—Zaripeshgi lease if equivalent to usufructuary mortgage.

The main difference between a Zaripeshgi lease and an usufructuary mortgage is that under an usufructuary mortgage the mortgagee is authorised to retain possession until the mortgage money is satisfied, but in a Zaripeshgi lease, the mortgagee is to retain possession for a definite period only. There is no intention to create the relationship of debtor and creditor. (*Zia-ul-Hasan J.*)

TULSI RAM vs. MUNNA KUAR.

1936 O.W.N. 399 = 162 I.C. 225.

MUSSALMAN WAKF ACT (XLII OF 1923)

Secs. 3, 9 & 10—Appointment of Receiver in proceedings under the Act, if permissible

Mussalman Wakf Act—(Contd.)

—appeal against order appointing Receiver.

The District Judge has no jurisdiction to appoint a receiver in proceedings under the Mussalman Wakf Act. But no appeal lies against an order appointing a receiver in such proceedings. (*Guha & Bartley JJ.*)

FATEH ALI MIRZA *vs.* MEHERUNNES-SA BEGAM.

40 C.W.N., 1300 165 I.C. = 740 = A.I.R. 1936 Cal. 420.

MUSSALMAN WAKF VALIDATING ACT (IV OF 1913)**Sec. 3, Proviso—Applicability.**

Where the terms of a wakf show an intention to make a permanent dedication of the wakf property for purely religious purposes, the ultimate benefit should be deemed to be impliedly reserved for the poor or for any other purpose recognised by the Mahomedan Law as a religious, pious or charitable purpose of a permanent character, and as such the wakf is beyond the scope of the Mussalman Wakf Validating Act, (*King C. J. & Zia-ul-Hasan, J.*)

RAHIMAN *vs.* BAQRIDAN.

1936 O.W.N. 165 = 160 I.C. 425 = A.I.R. 1936 Oudh. 213.

Sec. 3, proviso 'Impliedly'—Meaning of.

The word "impliedly" in the proviso to Sec 3 of the Mussalman Wakf Validating Act, 1913 means that the reservation can be indirectly inferred from the recitals in the deed coupled with surrounding circumstances, (*Sulaiman C. J. & Harris, J.*)

RUQIA BEGUM *vs.* SURAJMAL,

1936 A.W.R. 278 = 1936 A.L.J. 231 = 183 I.C. 344 = A.I.R. 1936 All. 404.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881)

Sec. 4—Document acknowledging receipt of money coupled with promise to repay—if a promissory note.

Negotiable Instruments Act—(Contd.)

A promissory note is an instrument containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of a certain person; or to the bearer of the instrument. Thus an instrument containing a receipt for money with a covenant for refund does not amount to a promissory note, unless there is evidence to show that the money was paid by way of loan to be repaid to the lender or to his order, (*Lord Atkin*)

MUHAMMAD AKBAR KHAN *vs.* ATTAR SINGH.

63 I.A. 279 = 17 Lah. 557 = 38 P.L.R. 1006 = 40 C.W.N. 997 = 63 C.L.J. 541 = 38 Bom. L.R. 739 = 71 M.L.J. 712 = 1936 M.W.N. 660 = 44 M.L.W. 23 = 17 P.J.T. 513 = 1936 A.W.R. 931 = 1936 A.L.J. 986 = 162 I.C. 454 = A.I.R. 1936 P.C. 171.

Secs. 5 & 13—Shahjog Hundi if a negotiable instrument.

A Shahjog Hundi, is a hundi payable only to a respectable holder, "that is, a man of worth and substance known in the bazar" It is a document in vernacular and is a negotiable instrument although it does not come within the definition of a bill of exchange in Sec. 5 of the Negotiable Instruments Act. 43 M. L. J. 480, 16 Bom. 689, 50 Bom. 765, 52 Bom. 810 & 6 All. 78 discussed. (*Harris & Rachpal Sing, JJ.*)

MANGAL SEN JAI DEO *vs.* PROSHAD *vs.* GANESHI LALL.

1936 A.W.R. 369 = 1936 A.L.J. 246 = A.I.R. 1936 All. 396 = 162 I.C. 894.

Sec. 15—Person writing name of endorser with his consent—endorsement, if properly "signed"

The word "signed" has not been defined in the Negotiable Instruments Act. Therefore a man may sign a promissory note by getting someone to write his name for him although such man does not affix any mark thereto. (*Baguley & Mackney JJ.*)

MA HNIN'E. *vs.* MAUNG TUN YIN.

A.I.R. 1936 Rang. 27 = 161 I.C. 528.

Negotiable Instruments Act—(Contd.)

Sec. 16—Endorsement of assignment on the back of promote—no direction to pay amount to specified person—validity of the assignment

The plaintiff sued as the assignee of a promote. The alleged assignment was in the form. "Received the amount from so and so." Held, that the words used did not constitute the endorsement within the meaning of Sec. 16 of the Negotiable Instruments Act because there was no direction to pay the amount of the instrument to a specified person. (*Venkataramana Rao J*)

GOVINDAN vs. NARAYANAN.

70 M.W.J. 467=1936 M.W.N. 241=
44 M.L.W. 371=162 I.C. 258=A.I.R.
1936 Mad. 417.

Sec. 76 (d) —Ouns of proving presentment of a promissory note, on whom lies.

A promissory note was executed at one place and made payable at another place. A suit brought on the basis of the promote, was dismissed by the trial court on the ground that the note had not been duly presented at the place where it was made payable; held, that proper presentment is the cause of action in a suit based upon a promissory note. Where, therefore, there has been no proper presentment, the plaintiff must prove that the other side suffered no damages from non-presentment, otherwise his suit is liable to be dismissed. (*Coldstream J.*)

ARJAN SINGH vs. MAQBUL AHMED.

38 P.L.R. 498=164 I.C. 1033=A.I.
1936 Lah. 799.

Sec. 76 (d)—Promote in hands of drawer—no hardship resulting to drawer—maintainability of the suit on the promote.

Sub-Sec. (d) to Sec. 76, Negotiable Instruments Act, indicates that where no hardship is shown in the case of a note which has not passed into other hands but is still in the hands of the drawer, the drawer cannot possibly say to anybody that he is going to suffer any damage for want of presentation, especially when the drawer admits execution of the note and acknow-

Negotiable Instruments Act—(Contd.)

ledges having received the consideration. (*Cunliffe J.*)

PANCH COWRI SADHU KHAN vs. SATYA DHENDU GHOSAL.

A.I.R. 1936 Cal. 489

Sec. 78—Manager of a firm holding promote electing to treat payment to firm as payment to himself—Debtor if discharged from liability.

Although under Sec. 78, Negotiable Instruments Act, payments must be made to the holder of the instrument but if the holder of a promote who is the manager of a firm elects to treat a payment made to his firm as payment to himself, the payment must be held to be a payment to the holder of the promote within the meaning of Sec. 78, Negotiable Instruments Act and the debtor is discharged from his liability under the promote. (*Nasim Ali & Edgley J.J.*)

AMIR CHAND vs. KRISHNA CHANDRA BHOWMICK.

A.I.R. 1936 Cal. 315.

Sec. 80—Date from which interest on a promote payable, when note silent as to payment of interest.

The date at which the amount of a promote "ought to have been paid by the party charged" within the meaning of Sec. 80, Negotiable Instruments Act is the date of the note itself and not the date of demand. So, where a promote is silent as to the payment of interest, the interest on the amount due thereon will run at 6 per cent per annum from the date of the promote till realisation. (*Zia-ul-Hassan J.*)

MANGHU LALL vs. BHAN PRATAP SINGH.

1936 O.W.N. 876=165 I.C. 243 (1)

Sec. 87—Test for determining whether an alteration in an instrument constitutes a material alteration.

The proper test for deciding whether there has been any material alteration in an instrument, is to see whether the alteration

Negotiable Instruments Act—(Contd.)

has change? in any way the rights and liabilities of the parties thereto. It is immaterial whether the change is prejudicial or beneficial. An endorsement in an instrument postponing the payment which was payable on demand, and altering the rate of interest constitutes a material alteration. (*Leach J.*)

JOHARMUL BEHARILAL vs. R. M. P. M. CHETTYAR FIRM.

14 Rang. 29 = A.I.R. 1936 Rang 136
162 I.C. 358.

Sec. 93—*Failure of assignee of a cheque to give notice of dishonour to assignor—Effect.*

Under the provisions of Sec. 93, Negotiable Instruments Act, it is incumbent upon the assignee of a cheque to serve the assignor therefore with notice of dishonour, and in the absence of such notice, the assignee cannot maintain an action for recovery of the sum due on the cheque. The failure to give notice has the effect of discharging the assignor both upon the assignment and the original consideration for the assignment. (*Agha Haidar J.*)

MOHAMMAD RAFI vs. MUZAFFAR HUSSAIN.

38 P.L.R. 240 = 165 I.C. 768 = A.I.R. 1936 Lah. 796.

Sec. 118—*Presumption regarding consideration—Onus of proving want of consideration.*

By virtue of Sec. 118, Negotiable Instruments Act, the Court is bound to presume that the consideration had passed until the contrary is proved, and the onus lies on the person who makes an allegation to the contrary to prove that it is so. Moreover, a casual or a professional money-lender is as much entitled to the benefit of the legal presumption as any innocent businessman in the world, and no degree of sentiment that one may cherish against him or his profession can legally deprive of the benefit. This rule of law is in no way affected by the provision contained in the Explanation attached to Illus. (c) of Sec.

Negotiable Instrument Act—(Contd.)

114, Evidence Act. For that section must be deemed to have been replaced by the rule of law embodied in Sec. 118, Negotiable Instruments Act. (*Addison & Din Mohammad J.*)

BANNU MAL vs. MUNSHI RAM.

17 Lah. 107 = 38 P.L.R. 552.

Sec. 188—*Suit on promote, if liable to be dismissed on the ground that consideration mentioned in note different from that proved.*

Under Sec. 118, Negotiable Instruments Act, there is a presumption that a promote was given for consideration. If a promote mentions one kind of consideration, but it is found in evidence that the consideration was of a different nature, the suit is not liable to be dismissed for that reason. (*Mohammed Noor & Rowland JJ.*)

BARHAMDEO SINGH vs. KARI SINGH.

A.I.R. 1936 Pat. 498 = 165 I.C. 809.

OATHS ACT (X OF 1873)

Secs. 8 & 11—*Parties to suit agreeing to abide by statement of a witness who is also party to suit—agreement, if binding.*

If the parties to a suit agree that they will abide by the statement of a witness and to leave the decision of all points arising in the case to be according to his statement, the agreement even apart from the Indian Oaths Act, is binding upon the parties and they cannot be allowed to resile from it on the ground that the witness in question was also a party to the suit. (*Srivastava A. C. J & Zia-ul-Hasan JJ.*)

BIRHUNATH SINGH vs. JAMUNA DAS.

1936 O.W.N. 841 = 164 I.C. 1116.

Sec. 12—*Party to an Oath—agreement resiling therefor—effect of Procedure to be followed.*

The plaintiff agreed to accept the oath of the defendant as conclusive of the matter

Oaths Act—(Contd.)

in issue, and the agreement was that the parties should appear before a certain temple, that the plaintiff should light camphor and the defendant should extinguish it while taking the required oath. The court thereupon issued a warrant to a commissioner appointing him to take the oath from the defendant in the presence of the plaintiff at a certain time on a stated day. When however the commissioner appeared to take the oath, the parties had decided to refer the matter to a panchayat and the oath could not therefore be taken. Subsequently the reference to arbitration having failed, the Court called on the plaintiff to deposit Rs. 6 for a fresh commission, as the defendant was still ready to take the oath, and on the plaintiff failing to make the deposit, the Court dismissed the suit. *Held*, that there is nothing in the Oaths Act to justify the dismissal of the suit on the plaintiff resiling from the oath agreement. As the oath agreement required the plaintiff to do a part of the ritual (lighting camphor), the oath could not be taken under the orders of the Court so as to bind the plaintiff in spite of his refusal. Under the circumstances, the trial court ought to have recorded the plaintiff's objection and proceeded with the trial of the suit on the merits drawing such inference as the circumstances might warrant from the conduct of the plaintiff. (*Wadsworth J.*)

ARUNACHALA MOOPANAR vs. VILLI AMMAL.

70 M.L.J. 449=163 I.C. 812=1936 M.W.N. 42=A.I.R. 1936 Mad. 406.

ORISSA TENANCY ACT (II OF 1913)

Secs. 65 & 67—Order of fine against landlord for not granting rent receipt. If open to revision.

An order of fine passed by a Sub-Divisional Officer against a landlord under Sec. 67 of the Orissa Tenancy Act for failure to grant receipts to tenants as required by Sec. 58 of the Act is an order passed by a Revenue Officer and is subject to appeal to the Collector. Such an order is not open to revision by the High Court. 1 P. L. J.

Orissa Tenancy Act—(Contd.)

149 & 9 C. W. N. 816 distinguished. (*James & Saunders JJ.*)

SARAT CHANDRA DAS MAHAPATRA vs. EMPEROR.

15 Pat. 350=16 P.L.T. 500=165 I.C. 925=A.I.R. 1936 Pat. 607.

Sec. 74—Onus of proving usage or custom in support of ejectment of Chandnadar tenant, on whom lies.

The onus of proving non-liability to ejectment shifts in ordinary cases to the tenant when a landlord suing for ejectment proves his title as such. But when a landlord sues for the ejectment of a chandnadar tenant, the onus lies on the landlord to prove a local custom or usage in support of the ejectment claimed, (*Courtney Terrell C. J. Dhale & Agarwalla. JJ.*)

JOHABAI KHAN vs. SRIKRISHNA DEY.

15 Pat. 187.

OUDEH CIVIL RULES.

R. 268, Explanation—Suit under Sec. 33, U. P. Agriculturist's Relief Act—appeal from decree in suit, where lies.

The effect of the addition of the explanation to R. 268 of the Oudeh Civil Rules is that a suit under Sec. 33 of the U. P. Agriculturist's Relief Act has to be valued for purposes of jurisdiction at such amount exceeding Rs. 100- and not exceeding Rs. 50- as the plaintiff may state in the plaint. All such suits would as a result be cognisable by the Munsiffs and appeals from such suits would lie to the District Judge. Where however a suit was valued at over Rs. 5000, and tried and decided by a Subordinate Judge prior to the addition of the explanation to R. 268, and no objection was taken to such trial by the defendant, *held*, that the appeal from the decree passed by the Sub-Judge lay to the Chief Court, (*Srivastava A. C. J. & Zia-ul-Hassan JJ.*)

MAHADEO PRASAD vs. LAL BAKHSH SINGH.

1936 O.W.N. 740.

ODDH ESTATES ACT (I OF 1869)

Sec. 8—*Widow constituting herself trustee notwithstanding sanad—decreed for under-proprietory rights against her, it binds beneficiaries.*

Where a widow is granted a *sanad* with absolute title followed by the entry of her name in the lists prepared under Sec. 8 of the Oudh Estates Act, but she prefers to constitute herself as a trustee on behalf of the remainderman and her co-widow for the purpose of carrying into effect the will of her husband, a decree for under-proprietory rights obtained against her binds the remainderman and those who derive title from him. The fact that the widow had parted with her life estate before the suit by executing a deed of gift in favour of her nephew is immaterial, because she still represented the estate held by her as a trustee on behalf of the remainderman and co-widow. (*Nanavutty & Zia-ul-Hassan JJ.*)

SHER BAHADUR SINGH vs. SRI MADHO PROSAD SINGH.

11 Luck. 209.

ODDH LAWS ACT (XVIII OF 1876)

Sec. 9 (1)—*Under-proprietory Khata-co-sharer with a vendor in the Khata-right of pre-emption.*

An under-proprietory khata is a component part of the under-proprietory tenure and is a sub-division within the meaning of Sec. 9 (1) Oudh Laws Act. Therefore, a co-sharer with the vendor in the under-proprietory tenure comprised in the khata has a preferential right of pre-emption under Sec. 9 (1) as against the vendee who has no share in the said khata. (*Srinastava A. C. J.*)

KALI DIN PANDEY vs. MUNESHWAR PROSAD & ANR.

1936 O.W.N. 759 = 164 I.C. 827 = A.I.R. 1936 Oudh. 403.

Sec. 9 (1) *Sub-division meaning of— if includes under proprietory khata.*

The word "sub-division" literally construed includes under-proprietory khata

Oudh Laws Act—(Contd.)

which is a unit or component part of the under-proprietory tenure in the mahal. (*Moss King C. J.*)

BHIKARI SINGH vs. BADRI.

1936 O.W.N. 424 = 161 I.C. 832 = A.I.R. 1936 Oudh. 307.

Secs. 9 10 & 13—*Suit for pre-emption—Proof of plaintiff's title—Acquisition of title during pendency of suit, if may be availed of.*

A plaintiff pre-emptor must show substantiating title not only at the date of the sale deed forming the subject matter of pre-emption, but also at the date of the suit. Where therefore during the pendency of a pre-emption suit, a collusive suit is brought for the purpose of making out a case for substantiating the title of the pre-emption and such suit is decided by a compromise entitling him to claim pre-emption the pre-emptor cannot derive any benefit under the compromise which is made subsequent to the institution of the pre-emption suit. (*Srinastava J.*)

MOHAMMAD ZAFFAR vs. TAJ BIBI.

1936 O.W.N. 337 = 161 I.C. 825 = A.I.R. 1936 Oudh. 250.

Chap 2—*Pre-emption suit—Right to preempt part of property.*

There is no provision in the Oudh Laws Act for tendering part of the price or for pre-empting part of the property proposed to be sold. Where therefore, to rival claimants sue for pre-emption of property sold in two villages, and one of them has pre-emption rights in both villages, while the other has a preferential right of pre-emption in one village and not in the other, the latter's suit must fail altogether even though after the institution of the suit he acquires a right in the other village. (*Srinastava & Nanavutty JJ.*)

MOHAMMAD ZAFFAR vs. TAJ BIBI.

1936, O.W.N. 337 = 161 I.C. 825 = A.I.R. 1936 Oudh. 250.

ODDH RENT ACT (XXII OF 1886)

Sec. 3 (18), 48 & 53 (2)—*Heir of statutory tenant—status of.*

The heir of a statutory tenant is entitled to retain possession of the holding as a tenant for five years, after the expiration of which, he may be ejected by the landlord at any time within a period of three years. If he is not ejected within that period, he acquires the status of a statutory tenant. Even during the period of three years during which the heir is liable to be ejected he is not in the position of a trespasser, and therefore cannot be ejected by the Civil Court but only by the Revenue Court, in accordance with the provisions of the Oudh Rent Act. (*King C. J.*)

JAGMOHAN AHIR vs. RAM KISHEN MISIR.

1936 O.W.N. 784=163 I.C. 922 =
A.I.R. 1936 Oudh. 322.

Secs. 7A & 108 (2)—*Ex-proprietory rights arising on a mortgage by a co-sharer—some co-sharers, if can sue for recovery of rent.*

Where ex-proprietory rights arise on a mortgage by a co-sharer, some of the co-sharers cannot sue alone for recovery of rent without joining the other co-sharers in the suit. (*Zia-ul-Hasan J.*)

MOHEN SINGH vs. HIMMAN SINGH.

1936 O.W.N. 36=159 I.C. 778=A.I.R.
1936 Oudh. 147.

Secs. 59 & 60—*Suit by tenant to contest notice of ejectment—suit subsequently withdrawn status of the tenant.*

Sec. 59, Oudh Rent Act applies only to a tenant who fails to institute a suit to contest a notice of ejectment. Where however such a suit is instituted by the tenant, but subsequently withdrawn by him, he must be regarded as a tenant holding over and not as a trespasser, unless the landlord takes steps to enforce the notice of ejectment under Sec. 60, Oudh Rent Act. (*King C. J.*)

JAGMOHAN AHIR vs. RAM KISHEN MISIR.

1936 O.W.N. 748=153 I.C. 922=A.I.R.,
1936 Oudh. 322.

Oudh Rent Act—(Contd.)

Sec. 106 (16)—*Suit by lambardar of pukhtadari village for arrears of rent—court by which cognisable.*

Suits under clause 16 of Sec. 108 of the Oudh Rent Act are not confined to suits for arrears of Government revenue payable through the lambardar by the persons who are superior proprietors. Therefore a suit by the lambardar of a pukhtadari village for arrears of rent alleged to be payable through him by the defendant is covered by the provision of Sec. 108, clause 16 of the Act, and is as such cognisable by the revenue Court. (*Srivastava A. C. J. & Ziaul Hassan J.*)

HARBANSLAL vs. DHIRAJA KUER.

1936 O.W.N. 599=164 I.C. 421 =
A.I.R. 1936 Oudh. 371.

Sec 108 (2)—*Suit for arrears of ex-proprietory rent by some co-sharers, if maintainable.*

A co-sharer who transfers his share to another, becomes an exproprietory tenant not only of his transferee, but of the entire body of co-sharers under Sec. 108 (2), Oudh Rent Act, and some only of the co-sharers cannot sue for arrears of exproprietory rent. (*Zia-ul-Hasan J.*)

MOHAN SINGH vs. HIMAN SINGH.

1936 O.W.N. 36=159 I.C. 778=A.I.R.
1936 Oudh. 147.

Secs. 108 (2) & 127—*Suit for arrears of rent and ejectment—defendant proved to be proprietor in possession for over 12 years—jurisdiction of the Civil Court.*

In a suit for arrears of rent and for ejectment under Sec. 108 (2) & 127, Oudh Rent Act, the defendant was proved to be an under proprietor like the plaintiff and was recorded as sirdar of a plot contiguous to the one from which he was sought to be ejected, the two together originally forming one whole khasra plot. He was also found to have been in adverse possession for over 12 years. Held, that Sec. 127 Oudh Rent Act

Oudh Rent Act—(Contd.)

was not applicable to the case and the plaintiff's remedy lay in a suit in the Civil Court. (*Nanavuti J.*)

CHAUHANJA BAKHSI SINGH vs. RAGHUBIR SINGH.

1936 O.W.N. 239 = 160 I.C. 1044 = A.I.R. 1936 Oudh. 14.

Sec. 108 (15)—*Suit under the section—defendant failing to produce accounts liability of defendant*

Where in a suit under Sec. 108 (15), Rent Act, the defendant pleads that he had not collected in excess of his own share, but fails to produce his accounts to support his plea, he becomes liable not only to pay the plaintiff's share of the profits, but to pay that share on the basis of the total recorded gross rental. (*Smith J.*)

LALTA PRASAD & ANR. vs. HARNAM SINGH.

1936 O.W.N. 810 = 164 I. C. 975.

Sec. 108 (15)—*Revenue Court if can try question of proprietary title of plaintiff who has been recorded as having such title.*

Where in a suit for profits a plaintiff is recorded as having proprietary title entitling him to institute a suit, it is not open to the Revenue Court to go behind the record, and receive evidence and try the question of proprietary title. (*Nanavutti J.*)

SALIK RAM vs. BHUDAR SINGH.

1936 O.W.N. 93 = 157 I.C. 1047.

Sec. 108 (15)—*Liability of co-sharer who has made collections to render accounts.*

A co-sharer who has made collections under an arrangement with the lambardar is liable to render accounts and surrender a portion of the amount collected to other co-sharer, even though the amount collected is less than his share. (*King C. J., & Zia-ul-Hassan J., Srivastava J., dissenting*)

NAWAB ALI KHAN vs. BASANT LAL.

11 Luck. 248 = A.I.R. 1936 Oudh. 117.

Oudh Rent Act—(Contd.)

Sec 108 (15)—*Co-sharer collecting less than his own share of rent—liability to render accounts and surrender portion to other co-sharers.*

Though a co-sharer who has collected less than his own share cannot always be made liable to render accounts and to surrender a portion of the amount collected by him to the other co-sharer, he should be so made liable in cases in which on account of special reasons, justice and equity require it. (*King C. J., Zia-ul-Hassan & Srivastava JJ.*)

NAWAB ALI KHAN vs. BASANT LAL.

11 Luck. 248 = A.I.R. 1936 Oudh. 117.

Sec. 127—*Tenant occupying grove land for the purposes of cultivation, if liable to be ejected.*

The right of a tenant to retain possession of grove land lasts only so long as he maintains it as a grove, but when he occupies it for the purpose of cultivation the grove tenure ends and the landlord is at liberty to treat him as a trespasser liable to ejectment under Sec. 127 of the Oudh Rents Act. (*Srivastava J.*)

SATTI DIN vs. JAI SINGH.

1936 O.W.N. 526 = 162 I.C. 708 = A.I.R. 1936 Oudh. 267.

Sec. 137—*Defendant holding under bonafide claim of title and not as trespasser—Sec. 127, if applicable.*

Sec. 127, Oudh Rent Act does not apply where the defendants are in possession of the disputed land under a bonafide claim of title, and have made out a strong *prima facie* case that they are not trespassers. (*Srivastava J.*)

BRIJ BHUSAN vs. COLLECTOR OF ALLAHABAD.

1936 O.W.N. 352 = 161 I.C. 821.

Secs. 127 & 128—*Grove split up and held by different persons—One portion brought under cultivation—Landlord if can claim rent for that portion.*

Oudh Rent Act - (Contd.)

The mere fact that a portion of a grove has become devoided of trees does not entitle the landlord to resume that portion of it in as much as the plot must be taken to have been granted as a whole. But where the grove has been split up into three portions and held by different grove holders and there was nothing in common between them, *held*, that the mere fact that the origin of all the plots was the same could not make the fate of one portion dependant upon the fact of the other. (*Srivastava J.*)

SATTI DIN vs. JAI SINGH.

1936 O.W.N. 526 = 162 I.C. 708 = A.I.R. 1936 Oudh. 267.

Secs. 129 & 132 Suit for Lambardri dues—limitation.

In the absence of any specific provisions relating to a claim for Lambardri dues, it must be governed by the general rule of limitation laid down in Sec. 129, which prescribes a period of one year from the date of accrual of the cause of action. (*Srivastava J.*)

RAMSWARUP vs. UMA NATH BAKSH SINGH.

1936 O.W.N. 452 = 162 I.C. 319 = A.I.R. 1936 Oudh. 262.

Secs. 151 & 152—Under—proprietary rights, if may be sold in execution of a decree for rent.

It is not open to a decreeholder, in execution of his decree for arrears of rent against an under proprietor, to sell the latter's property without trying to obtain satisfaction of the decree by proceeding against his movable property (*Zia-Ul Hossain J.*)

SHAHZAD KUNWAR DEPUTY COMMISSIONER PARTABGARH.

1936 O.W.N. 717. 164 I.C. 466.

PARTITION

Market or market land, if impartible in law.

A market or the site thereof is not impartible property but is subject to the

Partition—(Contd.)

ordinary incident of partition, when owned jointly. (*D. N. Mitter & Patterson JJ.*)

RABIA KHATOON vs. MUHAMMED ALI.
40 C.W.N. 1203.

Property held jointly with strangers, if to be included in partition.

An exception to the rule that all joint property must be brought into the hotchpot is that where properties are held jointly by all the co-sharers with strangers who cannot conveniently be added as parties to the suit for partition between members of the joint family, such properties should be excluded from the partition. 37 C. L. J. 191 followed. (*D. N. Mitter & Patterson J.*)

HAREY HAREY SINHA CHOWDHURY vs. HARI CHAITANYA SINHA CHOWDHURY.
40 C.W.N. 1237.

Partition, if can be effected by oral agreement.

A partition of property can be made by oral agreement. But if the terms of the partition are reduced to writing, then the document must be registered. There is however no necessity for any writing whatever in carrying out a partition, 58 Cal. 136 followed. 5 Rang 125 distinguished. (*Dunkley J.*)

KYI MAUNG vs. S. N. V. R. CHETTYAR FIRM.

A.I.R. 1936 Rang. 336 = 164 I.C. 392.

PARTITION ACT (IV OF 1893)

Sec. 3 (2)—Auction sale of joint property—public auction if authorised.

Sec. 3, Cl. 2, of the Partition Act does not authorise the Court to hold a public auction of joint property which is ordered to be sold under that section. The Court can only hold an auction amongst the co-sharers and sell the property to the co-sharers who offers to pay the highest price above the valuation made by the Court. (*M. C. Ghosh & R. C. Mitter JJ.*)

HARI CHARAN BERA vs. FAKIR CH. SAO.

40 C.W.N. 985.

Partition Act (IV of 1893)—(Contd.)

Sec. 4—House owned by two brothers—on the death of one brother the other mortgaging the house—mortgagee purchasing the house in execution of his mortgage deed—widow of deceased brother suing for declaration of her title in respect of one half—mortgagee applying for partition—widow thereupon applying to purchase the share of the mortgagee—application, if maintainable.

On the death of one of two brothers, the surviving brother mortgaged a house to which the two brothers were each entitled to a one half share. The mortgagee sued on his mortgage, obtained a decree, and in execution thereof purchased the house. Thereupon the widow of the deceased instituted a suit for a declaration of her right to a one half undivided share in the house. During the pendency of the suit the auction purchaser applied for partition under the Partition Act. The widow then purporting to act under the powers conferred by Sec. 4 of the Partition Act applied to buy the share of the auction purchaser. This application was allowed. The auction purchaser thereupon appealed to the High Court, contending that the widow was not entitled to apply under Sec. 4, Partition Act.

Held, that a widow of a member of a Hindu Joint Family, was herself a member of a Hindu Joint Family and was therefore entitled to apply under Sec. 4 of the Partition Act. (*Stone C. J.*)

LAXMAN BORIKAR KOSTI vs. MST. LAHANBAI BAAL.

19 N.L.J. 241 = 165 I.C. 930.

Sec. 5—Plaint alleging joint family firm of defendants—suit dismissed on ground that plaintiff has failed to prove that defendants were partners of firm—legality.

A partnership firm and a joint family firm are essentially different. It is not necessary to prove that there was an agreement between the members of the joint Hindu family in order to establish that a certain business was a joint family business. Accordingly, where the allegation in a plaint is about a joint family business of the defendants the Court is not justified in

PARTITION ACT (IV OF 1893)—(Contd.)

dismissing the suit on the ground that plaintiff has failed to prove that the defendants were the partners of the firm. (*Bennet J.*)

MAHABIR RAM vs. RAM KRISHAN RAM.

1936 A.I.R. 1006 = 1936 A.L.J. 1151 = A.I.R. 1936 All. 855.

PARTNERSHIP.

Suit for accounts—Accountbooks in possession of person claiming accounts—Maintainability of the suit.

It is the right of each partner to claim an account of a dissolved partnership, and the mere fact that the account books are in possession of the plaintiff does not necessarily enable him to find out what the amount due to him would be, because, before this is done, various matters have to be decided in the presence of the parties, as for instance the valuation of the assets including the debts due to the firm is one of the most important matters which has to be decided and the plaintiff alone is not competent to do so; in the alternative, the assets must be realised before the accounts can be settled. The plaintiff alone is not competent to do so; either to place his own value on the assets of the firm including the debts due to the firm or to realise them before suing for accounts. (*Jailal, J.*)

DOGAR SINGH vs. MT. PARBATI.

A.I.R. 1936 Lah. 146 = 161 I.C. 669.

Partners jointly owning immovable property—Mere use of that property for partnership business, if makes it partnership property.

It does not necessarily follow because certain partners jointly own immovable property which they use for the purposes of partnership business, that the property is partnership property. Whether it is or is not, depends upon the agreement between the partners. (*Allsop & Niamatullah, J.J.*)

LACHMAN DAS vs. MT. GUGAB DEBI

1936 A.W.R. 144 = 162 I.C. 148 = A.I.R. 1936 All. 290.

Partnership—(Contd.)

Minor partner not contributing capital, labour or skill—his guardian receiving separate wages for his labour—partnership if any.

Where prior to the enactment of the Partnership Act, two persons started a business, one of whom was a minor, who was not to contribute any capital, labour or skill, and his guardian appointed as a manager was paid for his labour separately, held, that in the circumstances there could be no valid partnership in law. Even if the guardian supplied labour on behalf of the minor, there could be no partnership because there was no contribution of personal labour. (*Bhide J.*)

NARINJAN SINGH vs. DAMODARI SINGH & ANR.

A.I.R. 1936 L.A. 831.

Stipulation about different properties being held in different shares—Validity of,

Although it is quite possible that partners might enter into a contract in respect of partnership property that part of that property should be held in certain shares and the rest of it in certain other shares, yet that is not what can be regarded as an ordinary arrangement. (*Allsop & Niamatulla, JJ.*)

LACHMAN DAS vs. MT. GULAB DEBI

1936 A.W.R. 144 = 162 I.C. 143 = A.I.R. 1936 All 270.

PARTNERSHIP ACT (IX OF 1932)

Sec. 1 (3) —Suit by unregistered firm, in respect of transaction which took place before 1st April, 1933 if maintainable.

Sec. 1 (3) of the Partnership Act provides that the Act shall come into force on the 1st Oct. 1932, except Sec. 69, which shall come into force on the 1st Oct. 1933. The meaning of that provision is, that after the 1st October 1933, Sec. 69 will become operative and that a firm which is not registered and which sues to enforce a right arising from a contract whether entered

Partnership Act—(Contd.)

into, before that date or after, shall be non-suited. (*McNair J.*)

GOPINATH MOTILAL vs. RAMDAS.

A.I.R. 1936 Cal. 132 = 161 I.C. 741.

Sec. 30—Liability of minor admitted to partnership on the death of a partner, for the acts of the firm.

Where after a partner's death, his son, a minor carries on the business of the firm, along with the other partners in the name of the firm, he should be presumed to have been admitted to the benefits of the partnership under Sec. 30 (1), Partnership Act, even though he cannot strictly be said to be a partner. Under sub-sec. 3 of Sec. 30, his share in the partnership business is liable for the acts of the firm, but he is not personally liable for such acts. 49 L. A. 108 approved. (*King C. J. & Zia-Ul-Hasan, J.*)

HAFIZ ABDUL RAZZAQUE & ANR. (Firm) vs. RAUF AHMED.

1936 O.W.N. 221 = 160 I.C. 593 = A.I.R. 1936 Oudh. 245.

Secs. 69 & 74 (b)—Suit by unregistered firm, if maintainable, where cause of action accrued before passing of the Act.

Sec. 65 Partnership Act, did not come into operation before the 1st Oct. 1933, and this was intended to give time to unregistered firms to get themselves registered in order to enable them to bring suits. Sec. 74 (b) of the Act only saves pending suits, but there is no provision which makes a suit by an unregistered firm maintainable on the ground that the cause of action accrued before the passing of the Partnership Act. (*Khaja Mohammed Noor & Varma JJ.*)

SHAZAD KHAN vs. DARBAR BABU KUCHHI.

15 Pat. 810 = 17 P.L.T. 713.

Secs. 69 & 74 (b) —Suit by unregistered firm after coming into force of Act, if maintainable, although concerning previous obligation.

Partnership Act—(Contd.)

Sec. 74 (b), Partnership Act deals only with proceedings pending at the when time the Partnership Act came into force. No suit or proceeding commenced after the Partnership Act came into force, is maintainable by an unregistered firm, although the subject matter may be an obligation which arose before the Act. 39 C. W. N. 67 & 39 C. W. N. 1080 followed. (*R. C. Mitter J.*)

RAM SUNKAR BHOWMICK vs. MADHU SUDHAN DEB NATH.

40 C.W.N. 1180.

PATENTS & DESIGNS ACT (II of 1911)

Sec. 53 (1) (b)—*Suit for infringement of designs—unconditional undertaking by defendant not to sell or infringe—such undertaking given before proceeding to trial—refusal by plaintiff to accept such undertaking—plaintiff is entitled to cost in such cases.*

The defendant in an action for infringement of copyright in a design gave an unconditional undertaking at a very early stage not to sell publish for sale or otherwise deal in any goods with the disputed designs or obvious imitation thereof, so long as the plaintiff's copyright in the said design subsisted and further consented to give such an undertaking to the Court. The plaintiff however instead of accepting such undertaking proceeded to trial.

Held, that the undertaking should have been accepted by the plaintiff who should have asked for judgment in the form of an order embodying the undertaking. If the plaintiff does not ask for an order embodying the undertaking but elects to go on with this suit, he ought not to get the cost incurred by so doing. On the contrary he ought to pay such cost to the defendant as from that date onwards. (*Lort Williams J.*)

CALICO PRINTERS ASSOCIATION, LTD. vs. D. N. MUKHERJEE.

40 C.W.N. 938=A.I.R. 1936 Cal. 493.

Sec. 53 (1) (b)—*Onus of proving knowledge under the section lies on the plaintiff.*

Partnership Act—(Contd.)

The onus of proving knowledge under Sec. 56 (1) (b) of the Patents and Designs Act, is on the plaintiff and Sec. 106 of the Evidence Act has no application to such cases. (*Lort Williams J.*)

CALICO PRINTERS ASSOCIATION vs. D. N. MUKHERJI.

40 C.W.N. 938 A.I.R.—1936 Cal. 493.

PENSIONS ACT (XXXIII OF 1871)

Secs. 11 & 12—*'Muafi' rights, if may be regarded as pension.*

A grant conferring 'Muafi' rights cannot be regarded as a pension within the meaning of Sec. 11 & 12 of the Pensions Act. 26 All. 617 & 1929 A. L. J. 724 relied on. (*Thom & Smith JJ.*)

MUMTAZ HUSSAIN vs. BABU BRAHMANANDA

1936 A.W.R. 65=1936 A.L.J. 161=162 I.C. 56=A.I.R. 1936 All. 298.

Sec. 12—*Assignment of land revenue in perpetuity—grant not restricting transfer—grant, if transferable.*

Where an assignment of land revenue is made to a certain person and his heirs in perpetuity and there is nothing in the grant to indicate that the grant is not transferable, the grant is transferable and the case is not barred by Sec. 12 of the Pensions Act. (*Sulaiman C. J. & Bennet J.*)

MST. KULSOOMAN NISSA vs. NOOR MOHAMMED.

1936 A.W.R. 702=164 I.C. 1066=A.I.R. 1936 All. 686.

PLEADING.

Amendment—*Amendment of plaint—Plaint reading certain documents in particular way, if may be allowed to be amended by reading the document in another way.*

Where the claim in a suit is made on a document, the fact that at one stage when a plaint was presented it was read in a

Pleading—(Contd.)

particular way and at another time when it is sought to be amended it is sought to be read in another way will not justify the view that a new and inconsistent course of action is sought to be introduced. They are really alternative ways of reading a document, and it will be for the Court to decide what its correct construction is. The Court should therefore grant permission for the amendment of the plaint. (*Varadachariar, J.*)

SUBRAMANIAN NAMBOODRIPAD vs.
BASUDEVAN NAMBOODRIPAD.

160 I.C. 939 = A.I.R. 1936 Mad. 151.

Amendment—Judgment or order not in conformity with pleadings—who should amend pleadings.

If a Judgment or order is made which is not entirely in conformity with the pleadings, the party in whose favour, the judgment is pronounced should be called upon to amend his pleadings. (*Worl J.*)

GOPINATH VARMA vs. MANAUR
HASAN.

A.I.R. 1936 Pat. 40 = 160 I.C. 927 (1) =
17 Pat. L.T. 275.

Construction—Duty of Court when there is variance between plaintiff's pleadings and case alleged at trial.

Pleadings should not be construed too narrowly and therefore in dealing with the question where there has been a variance between a plaintiff's pleadings and the case alleged at the trial, the Court must look not to the mere wording of the plaint but to the issues which were settled for trial and to the manner in which the case was deliberately fought out by both the parties in the trial court. (*D. N. Mitter & Patterson J.J.*)

BEJOY KUMAR BHATTACHARJEE vs.
FIRM SATISH CH. NUNDY & ORS.

A.I.R. 1936 Cal. 382.

Construction—Inconsistent plea in pleadings—Rule against joinder of such plea, if absolute

Pleadings—(Contd.)

Where the facts are presumably within the plaintiff's knowledge, he should not be allowed to plead inconsistent facts but should be required to alienate so that the defendant may know what case he has to meet and similarly the defendant may not claim inconsistent facts unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge. The rule against the joinder of inconsistent and alternative titles is thus not of an absolute character and cases are conceivable when a plaintiff may, from obscurity or from complexity, know facts by any honest doubt as to the nature of relief available to him and inconsistent claims may therefore be entertained but not when there can be no reasonable excuse for them. (*Courtney Terrel C. J. & Dhavle J.*)

MST. DAIWATI KUER vs. MST.
TUNKI KUER.

15 Pat. 448 = A.I.R. 1936 Pat. 474 =
164 I.C. 807.

Construction—Party, if can claim relief by setting up new case inconsistent with case in plaint

It is not open to a party to ask for relief by setting up a case which is new and absolutely inconsistent with the case in the plaint. In the application of this salutary rule, the test to be employed is, whether the new case set up would take the defendant by surprise. 43 Cal. 748 relied on. (*M. C. Ghose & R. C. Mitter J.J.*)

ABDUL KHALEQUE MONDOL & ORS.
vs. BEPIN BEHARI & ORS.

A.I.R. 1936 Cal. 465.

Pleading if can be struck out on the ground of want of probate.

A pleading cannot be struck out in limine on the ground of want of probate, because it is open to the party pleading to take out probate after the framing of the issues and before the close of the trial of the case, (*Courtney Terrel C. J. & Dhavle J.*)

MST DAIWATI KUER. vs. MST. TUN-
KI KUER.

15 Pat. 448 = A.I.R. 1936 Pat. 474 = 164
I.C. 804

POSSESSION

Suit for possession—What must be proved by the plaintiff.

When a man sues for possession of property which is in the possession of another, he must show that he has a subsisting title to the property. It is not enough for him to show that he once had a title to that property. One of the ways in which he can show that he has a subsisting title is to bring evidence to show that he once owned the property and that at the time he was unlawfully dispossessed, he was still the owner of that property. (*Macknuy J.*)

MA PYAN GVI vs. U SHWE KYUN.

A.I.R. 1936 Rang. 124 = 161 I.C. 833.

PRACTICE.

Adjournment—*Small Cause Court suit of about Rs. 40 in value—defendant residing in another province, and not appearing on first date—propriety of adjournment.*

In a Small Cause Court suit, where the defendant resides in another province and does not appear on the first date, an application for adjournment is in the usual course and ought to be allowed. (*Courtney Terrell C. J. Macpherson & Fazl Ali, JJ.*)

BRHO NANDAN SINGH vs. RAM NATH MALL.

15 Pat. 561 = 17 P.L.T. 329 = 162 I.C. 568 = A.I.R. 1936 Pat. 472.

Admission—*Suit for share of Shamlat—Admission by some defendants—Plaintiff failing to establish title—Effect of admission.*

The plaintiffs sued for a declaration that they were entitled as owners to a part of the Shamlat of which they were in possession. Some of the defendants admitted the plaintiffs claim but the others contested the suit. The suit was decreed by the trial court but dismissed by the appellate court. In second appeal the plaintiffs contended that they were at least entitled to the shares of those defendants but had admitted the claim, i.e.,

Practice—(Contd.)

of those who had not appealed. There was no material on the record for ascertaining as to what shares those defendants were entitled. Held, that the plaintiffs could not lose the benefit of the admission which had been made in their favour and they were therefore entitled to acquire the shares of the defendants other than the defendants who had contested the suit. (*Monroe J.*)

SOHON LAL vs. TEJA SINGH.

38 P.L.R. 578 = A.I.R. 1936 Lah. 971.

Appeal—*Presentation of appeal—Authority to present the same.*

The presenting or the filing of the appeal amounts to acting on behalf of the appellant, and the person presenting the appeal must be duly authorised to act on behalf of the appellant on the day that the appeal is presented. The appeal may be presented by the clerk of the pleader, and the presentation of the appeal by him is equivalent to a presentation by the pleader himself when it is signed by the latter and the clerk is duly authorised. (*Abdul Rashid J.*)

NAWAB vs. CHARAGH.

A.I.R. 1936 Lah. 195.

Appeal—*Appellate Court, if may hold against trial court as to credibility of oral evidence.*

It is open to an appellate Court to differ from the Court which heard the evidence where it is manifest that the evidence accepted by such Court of first instance is contradictory or is so improbable as to be unbelievable or is for other sufficient reasons unworthy of acceptance. (*Lord Roche*).

BHOJRAJ vs. SITARAM & ORS.

40 C.W.N. 257 = 70 M.L.J. 225 = 1936 M.W.N. 184 = 1936 O.W.N. 38 = 19 N.L.J. 36 = A.I.R. 1936 P.C. 60 = 160 I.C. 45 = 1936 A.W.R. 37 = 38 P.L.R. 69 (2) = 38 Bom. L.R. 344 = 63 C.L.J. 42 = 1936 A.L.J. 755

Appeal—*Finding of fact of trial Court—appellate Court, when may reverse the same*

Practice—(Contd.)

In reversing the findings of fact arrived at by the trial Court, the appellate Court should consider the reasons given by the trial Court and apply its mind to the evidence on which the trial Court based its findings. The appellate Court should discuss all the relevant evidence and give reasons for its conclusions on the facts involved in the case. (*Nasim Ali J.*)

RAGHUMANI ROY vs. BIBHUTI BRUSAN ROY.

64 C.L.J. 65.

Appeal—*Plea of want of jurisdiction, of can be raised in Letters Patent appeal.*

A plea of want of jurisdiction can be raised in a Letters Patent appeal even though it does not appear to have been pressed at the time of the hearing of the appeal by a single judge. (*Sulaiman C. J. & Bennet J.*)

MUNICIPAL BOARD, BENARES vs. KRISHNA & CO.

57 All. 916.

Appeal—*Preliminary objection not decided by court remanding the case, if can be taken again in appeal.*

Where a preliminary objection had not been explicitly or impliedly decided by the appellate Court and the case was remanded, then the objection can be raised when the case again comes up before the Court which remanded it. 34 P. L. R. 215 distinguished. (*Tekchand & Dilip Singh JJ.*)

NIHAL CHAND vs. DISTRICT BOARD, MIANWALI.

A.I.R. 1936 Lah. 564.

Appeal—*Lower Court deciding question of title on inadmissible evidence and other evidence—procedure open to the High Court in second appeal.*

Where the lower appellate Court has decided a question of title, which is one of fact on inadmissible evidence and other evidence, there are two courses open to the High Court

Practice—(Contd.)

in second appeal. It can remand the case to the lower appellate Court directing it to record a fresh finding after eliminating and confirming itself to the other evidence in the case; or it may proceed under Sec. 108, C. P. Code and arrive at its own finding on a perusal of the relevant and admissible evidence. (*Agha Haidur J.*)

MT. MULKH BANO vs. MOHAMMED BANARES KHAN.

A.I.R. 1936 Lah. 786.

Application—*Court, if can fix time for presenting application.*

An applicant has a right to put his application or complaint at any time during the Court hours. Lower Courts make rules fixing time when applications of various types should be presented for the convenience of the Court as well as for the convenience of the public. But the legal right of every applicant is that he is entitled to make his complaint at any time during court hours. It is therefore the duty of a Munsarim to accept an application in spite of the fact that it is made after 3 P. M. (*Thom & Rachhpal Singh JJ.*)

BEHARI LAL vs. ALI NABI.

1936 A.W.R. 489=162 I. C. 349=
1936 A.L.J. 559=A.I.R. 1936 All. 626.

Appearance—*Party engaging pleader if under an obligation to attend in person.*

Unless expressly directed, a party is not bound to attend in person even in the original side much less in the appellate Court, if the party does all he is required to do under the law to retain a pleader, and he is failed or betrayed by the pleader it is manifestly unjust to visit the party with penalty. So where a suit or appeal is dismissed for non-appearance and it is clear that a pleader was fully instructed by the party to appear on the latter's behalf but he fails to do so, there is sufficient cause for his non-appearance to justify the Court in restoring the suit or appeal to file for being heard on merits. (*Niyogi A. J. C.*)

PANDU vs. HIRA.

A.I.R. 1936 Nag. 85.

Practice—(Contd.)

Costs—Suit dismissed with costs—Such dismissal, if includes costs of a commission appointed in the suit or merely confined to general costs of suit—*Summons for determining such costs of commission, if restricts Court to merely construe orders.*

On an application for examination of a person on commission an order was made for such examination and it was directed that the costs of and incidental to the application including the fee of the Counsel will be costs in the cause. No explicit direction was given as to how the costs of the commission would be dealt with. The suit against one of the defendants having been dismissed with costs—on plaintiff's failure to furnish security ordered—he took out summons for determining his rights to the costs of the commission as against the plaintiff. *Held*, (1) that the costs of the commission in the absence of express provision must be borne by the several parties; (2) that the order dismissing the suit against one of the defendants with costs must be held to be the general costs of the suit exclusive of the costs of the commission. *Held*, further, that in determining the above question the Court was precluded from investigating the circumstances in which the commission was granted and the conduct of the various parties with regard to it but could only construe the orders as they stood. (*Panckridge J.*)

EASTERN TAVOY MINERALS CORPORATION LTD. vs. CLARKE RAWLINS KER & CO.

40 C.W.N. 1068.

Cross objection—application to file after limitation—order accepting cross objection, subject to exceptions taken at hearing, if proper.

An application for extension of time for filing a cross objection should be dealt with when it is made and should not be left over for determination till the hearing of the appeal by an order allowing the application, subject to any exception being taken at the time of the hearing. (*D. N. Mitter & Patterson J.J.*)

HAREY HAREY SINGH CHOWDHURY vs. HARI CHAITANYA SINGHA CHOWDHURY.

40 C.W.N. 1237.

Practice—(Contd.)

Decree—Decree in account suit—what it should contain.

In an account suit, the Court should, while passing a decree express specifically all directions contained in the judgment rather than insert the general reference to the judgment in the decree. (*Lord Thackerston.*)

MONOHAR MUKHERJI vs. BHUPENDRA NATH MUKHERJI, & ORS.

38 P.L.R. 359=1936 O.W.N. 367=
161 I.C. 927=A.I.R. 1936 P.C. 325
(P.C.)

Duty of court—Transaction when will be set aside on ground of fraud.

The Courts administering equity, justice and good conscience will set aside a transaction on the ground of fraud where there is such gross inadequacy of price as would shock the conscience and amount in itself to be conclusive and decisive evidence of fraud. (*D. N. Mitter & Patterson, J.J.*)

NALINI KISORE CHOWDHURY vs. ATUL CHANDRA CHAKRAVARTY CHOWDHURY.

40 C.W.N. 581.

Evidence—Question put to witness objected by other side—Procedure to be followed.

The Counsel for the plaintiff objected to a certain question being put to the witness by the Counsel for the defendant. The Judge allowed the question to be put "subject to objection". *Held*, that the proper course for the Court to follow in such a case was to allow the question to be recorded and then to give its ruling whether such question was allowed or disallowed. (*Tekchand & Abdul Rashid J.J.*)

MT. MAHMMAD SULTAN BEGUM vs. SARAJUDDIN AHMED.

A.I.R. 1936 Lah. 183.

Evidence—Affidavit or statement of process server on back of summons, if may be tendered in evidence.

Practice—(Contd.)

The affidavit or statement on solemn affirmation of a process-server on the back of the summons or notice served by him is legal evidence even though the process-server is not examined as a witness. (*Young C. J. & Monroe J.*)

KANYA LALL vs KISHORE CHAND
& ORS.

38 P.L.R. 279 = 164 I.C. 790.

High court—Jurisdiction of Taxing Officer, if confined to memo of appeal to the High Court only.

The jurisdiction of the Taxing Officer of the High Court is confined to the question of Court-fee on the memorandum of appeal to the High Court. It does not extend to the question of proper court fee in the Court below. (*Courtney-Terrel & C. J. Dhaole J*)

NOKHE LAL JHA vs. SH. RAJESHWARI.

17 P.L.T. 677 = 165 I.C. 213.

High court—Original Side, Calcutta—puisne mortgagee having independent properties mortgaged to him, if entitled to a decree for sale of such properties in prior mortgagee's suit.

Even in the Original Side of the Calcutta High Court a puisne mortgagee who has been made a defendant in the suit of the prior mortgagee is not entitled to a decree in that suit for the sale of additional properties mortgaged to him but which are not included in the prior mortgagee's mortgage. (*McNair J.*)

MOTILAL DAGA & ORS. vs. SUSHIL KUMAR MUKHERJEE & ORS.

40 C.W.N. 205 = 62 Cal. 625 = 161 I.C. 520 = A.I.R. 1936 Cal. 114.

High court Full Bench decision of High Court—single judge, if bound to follow Full Bench ruling.

It is open to a single Judge of a High Court to entertain a doubt on any question of law, but he is bound to follow a Full

Practice—(Contd)

Bench ruling on the point, and the operative portion of his order must be in strict accordance with the rulings of the Full Bench and should in no way deviate from it. (*Sulaiman C. J. & Bennet. J.*)

GENDA MALL vs. SUKHDARSHAN LALL.

1936 A.L.J. 736 = 1936 A.W.R. 531 = 164 I.C. 200 = A.I.R. 1936 All. 555.

Injunction—Interlocutory injunction which covers the entire relief claimed, if may be granted.

It is neither the rule nor the practice of the Court to grant, on any interlocutory application, an injunction which will have the practical effect of granting the entire relief claimed in the suit, in the absence of apparent urgency and injury to the applicant. (*McNair J.*)

RAMESWAR LATH vs. CALCUTT WHEAT AND SEEDS ASSOCIATION.

40 C.W.N. 1201.

Jurisdiction—Decree sent to Collector for execution—Court, if can consider validity of an order.

It is open to the Court even after a decree has been sent to the Collector for execution, to consider the validity of an order for sale. The mere fact that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order. (*Broomfield & Macklin JJ.*)

SATTAPPA GURUSATTAPPA HUKARI vs. MAHOMED SAHEB.

60 Bom. 516.

Parties—Death of some of the respondents in an appeal in which large number of persons involved—delay in applying for substitution, if may be condoned.

Where in an appeal a very large number of respondents were impleaded, and some of them died and their heirs were not brought on the record within time, but no

Practice—(Contd.)

negligence was found on the part of the appellants in making applications for substitutions, *held*, that in the circumstances of the delay in making the application for substitution could be condoned. (*Tek Chand J.*)

MEHR SINGH vs. SOHAN SINGH.

A.I.R. 1938 Lah. 710 = 165 I.C. 521 =
38 P.L.R. 915.

Parties—Intervention by third party when proper.

Intervention by a third party in a suit, however excellent the motive may be, is contrary to judicial principles. Government or any other authority designated by government which is satisfied that intervention is required, cannot intervene at all except on formal authorisation by the defendant of the Government pleader or other pleader in that regard. (*Courtney Terrell C. J. Macpherson & Fazl Ali JJ.*)

BROJO NANDAN SINGH vs. RAM NATH MALI.

17 P.L.T. 329.

Parties—Communication to Court from third parties, how ought to be treated.

Communication to the Court by letter or otherwise from third parties, being improper, however laudable the motive may be, should not form a part of the record. Under no circumstances should action be taken upon such a communication unless and until the court has drawn to them the attention of the party who might be affected and has heard such party, ordinarily in open Court. (*Courtney Terrell C. J. Macpherson & Fazl Ali JJ.*)

BROJO NANDAN SINGH vs. RAM NATH MALI.

17 P.L.T. 329.

Privy Council—Concurrent finding of facts—Privy Council, if will interfere even when there are incidental questions of law.

It is the common practice of the Privy Council not to interfere with concurrent

Practice—(Contd.)

finding of facts however much incidentally there might have been questions of law involved on particular points. (*Lord Thacker J.*)

SAHOO JAGADISWAR NATH vs. SAHOO GOURI SHANKAR.

1937 A.W.R. 502 = 161 I.C. 589 = 70
M.L.J. 574.

Process fee—Conveyance charges for sheriff's officer, if authorised—Party at whose instance process issued, if must attend sheriff's office when no identification of person to be served necessary.

Neither under the rules of the Appellate Side of the High Court nor under the rules of the Original Side, is the Sheriff entitled to levy conveyance charges for his officer who serves a process; and no one on behalf of the party at whose instance the process is issued need attend his office where no identification of the person to be served is necessary. (*Mukherjee & Jack JJ.*)

BRAHMA NIRANJAN CHAKRAVARTY vs. JAGADAMBA LOAN CO., LTD.

40 C.W.N. 1295.

Relief—Injury to party by reason of act or default of Court or its officers—Relief against such injury.

Where by reason of some act or omission on the part of the Court or its officers, an injury has been done, it is the duty of the Court to relieve parties against the injury caused by its own acts or defaults or the acts or defaults of its officers. 40 C. W. N. 680 re-affirmed. (*R. C. Mitter J.*)

MUKTI DEVI vs. MANORAMA DEVI.

40 C. W. N. 1211 = A.I.R. 1936 Cal. 490

Transfer of suit—administrative changes—Court if must serve notice upon the parties regarding the transfer.

Owing to administrative changes a suit was transferred from one Court to another Court in a different town. The pleader for the plaintiff was informed of the transfer but he replied that he was authorised to

Practice—(Contd.)

appear in one particular Court only. On the date of hearing the plaintiff not being represented the suit was dismissed for default. *Held*, that although the pleader ought to have informed his client that the case has been transferred to a different Court and he was not prepared to appear in that Court yet the Court, was not justified in refraining from serving notice upon the party regarding the transfer of the suit and the fresh date fixed for hearing. (*Agha Haidar J.*)

TILOK SINGH vs. MAHAMMED RASHID.
A.I.R. 1936 Nag. 560 164 I.C. 142.

Trial—Counsel if can ask Court to hear case within Court hours.

The Counsel for the accused are within their right to ask the presiding Judge to hear the case as far as possible during the hours fixed for the sitting of the Court. (*Iqbal Ahmed J.*)

SALIGRAM vs. EMPEROR.

1936 A.W.R. 967.

Trial—Trial not held in open Court—Decree passed in such trial, if valid.

A trial not held in open Court, that is to say, in a Court patently open to any one who may present him-elf for admission, is a trial held in breach of a public right and not a proper trial at all. Divorce actions, even those which are undefended, are not any the less but even more particularly subject to this rule. A trial of a divorce case held in breach of the rule of publicity must be condemned so that it shall not again be permitted. Where however a trial has been held in breach of the rule of publicity, the decree made therein is only voidable and not void and steps to avoid it must be taken before the time for appeal has expired or before the rights of third parties have intervened. The decree is voidable and not void even when it involves questions in which the public are interested, at any rate in cases in which the public

Practice—(Contd.)

have a right of intervention. (*Lord Banesburgh.*)

CORA LILIAN MACPHERSON vs. ORAM LEO MACPHERSON.

40 C.W.N. 488=161 I.C. 260=70 M.L.J. 385=17 P.L.T. 243=1936 A.L.J. 727=1936 M.W.N. 513=1936 A.W.R. 613=38 Bom. L.R. 468=A.I.R. 1936 P.C. 246.

Trial—Receiving written notes of argument after hearing of case—Written notes accepted from parties and then additional notes from prosecution—Trial, if invalidated.

The practice of receiving from the pleaders of the parties written notes of arguments after a case has been heard is most reprehensible. Where a week after the hearing of the case, written notes of argument were accepted from both parties and then additional notes were accepted from the prosecution and it appeared that the defence had no opportunity for meeting the points raised therein: *Held*, that the trial was invalidated. (*Jack J.*)

JIGENDRA NATH MUKHERJEE vs. RABINDRA NATH CHATTERJEE.

40 C. W. N. 863=165 I. C. 150 =37 Cr L.J. 1089=64 C.L.J. 7.

Trial—Trial not held in open Court, if proper trial—Open Court—Meaning of.

Subject to certain strictly defined exceptions, such as applications properly made in chambers and infant cases, every Court of Justice must be open to every subject of the King. The actual presence of the public is not necessary but whether anyone is likely to attend or not, there must be complete freedom of admission so that, *inter alia*, a certain formality and decorum of procedure of which the potential presence of the public is some guarantee, may attend the proceedings and the tenency to the quickest possible disposals without properly distinguishing one case from another may be checked. (*Lord Banesburgh.*)

CORA LILLIAN MACPHERSON vs. ORAM LEO MACPHERSON.

161 I.C. 260=70 M.L.J. 385=40 C.W.N. 488=17 P.L.T. 243=1936 A.L.J. 727=1936 M.W.N. 513=1936 A.W.R. 613=38 Bom. L.R. 468=A.I.R. 1936 P.C. 246.

Practice—(Contd.)

Waiver—*Litigant, if can waive right conferred by statute.*

There is nothing to prevent the litigant waiving any right he may have under the Civil Procedure Code or under any other statute unless the waiver of the right or the absence of the right makes any particular matter illegal. (*Wort, J.*)

SASHIBHUSAN PROSAD SINGH vs.
DALIP NARAIN SINGH.

17 Pat. L.T. 108 = A.I.R. 1936 Pat. 76
= 159 I.C. 717.

Waiver—*Right of litigant to waive rights under a statute.*

There is nothing to prevent a litigant from waiving any right he may have had under the Civil Procedure Code or under any other statute, unless the waiver of the right or the absence of the right makes any particular matter illegal. (*Wort J.*)

SASHI BHUSAN PROSAD SINGH vs.
DALIP NARAIN SINGH.

17 Pat. L.J. 108 = 159 I.C. 177 A.I.R.
1936 Pat 75.

PRE-EMPTION.

Property in possession of mortgagees—right of the pre-emptor.

Or, 20, r. 14(1) (b). C. P. Code, provides that on payment into Court of the purchase money by the pre-emptor, the property shall be delivered to him, and his title shall be deemed to accrue from that date. If the property is in possession of mortgagees, the pre-emptor merely pre-empts the equity of redemption, and if he deposits the money in the Court within the period specified in the decree, he need not execute the decree for possession nor need he immediately sue the mortgagees for possession. 45 All. 482 relied on. (*Addison & Din Mohammed JJ.*)

FATELCHAND vs. MOTI SINGH.

16 Lah. 1065.

Pre-emption—(Contd.)

Resale to vendor—Right of pre-emption, if lost.

The resale of the property by the vendee to the vendor does not defeat a right of pre-emption. (*Agha Haidar J.*)

MUZAFFAR KHAN vs. MUHAMMAD KHAN.

38 P.L.T. 224.

Mohomedan Law of pre-emption adopted by custom among Hindus—Effect of.

Where it is found that the Mahomedan Law of pre-emption is adopted by custom among Hindus, it must be held that the full law is adopted unless there is clear proof that some elements in the law are omitted. (*Sullaiman C. J. & Pullan J.*)

RAMNATH vs. BANWARI LAL & ANR.

1936 A.W.R. 419

Execution of decree stayed pending vendee's appeal on vendee furnishing security bound by surety in favour of Court—pre-emptors right to enforce the bond.

The execution of a pre-emption decree was stayed pending the decision of the vendee's appeal on condition that the vendee should furnish security for any loss resulting to the pre-emptors from the order of stay. On the face of it the bond executed by the surety purported to be in favour of the Court but it also declared that the pre-emptors will have a right to enforce the bond by instituting a suit for recovery of damages and costs by sale of the hypothecated property. Held, that the last stipulation entitled the pre-emptors to institute a suit for enforcing the security bond. (*Niamatullah & Collister, JJ.*)

JANG BAHADUR SINGH & ORS. vs.
BASDEO SINGH & ORS.

1936 A.W.R. 793 = 1636 A.L.J. 860 =
164 I.C. 248 = A.I.R. 1936 All. 549.

Notification exempting land in Municipal limits from right of preemption if co-

Pre-emption—(Contd.)

vers land brought within municipal limits after notification.

A notification which exempts land within the limits of a Municipality from the operation of the right of pre-emption should be considered to be wide enough to cover the areas which may be brought within the municipal limits of the Municipality after the date of the notification. (*Jailal J.*)

HIRALAL vs. MT. JIWAN & ANR.

161 I.C. 860 = A.I.R. 1936 Lah. 145 = 17 Lah. 426 = 38 P.L.R. 876.

Pre-emptor depositing decretal amount—vendee retaining possession—liability for mesne profits.

A pre-emptor becomes entitled to possession of the pre-empted property immediately on depositing the purchase money and the vendee retaining possession after that event must be considered to be in wrongful possession and liable to pay mesne profits to the pre-emptor. (*Niamatullah & Collister JJ.*)

JANG BAHADUR SINGH & ORS. vs. BASDEO SINGH & ORS.

1936 A.W.R. 793 = 1936 A.L.J. 860
164 I.C. 248 = A.I.R. 1935 All. 519.

PRESCRIPTION.

Factors necessary for proving lost grant.

To infer a doctrine of lost grant or a claim based on prescription, all that is necessary to be alleged is long, continual and peaceful possession. Where these incidents are found, the Court will, if possible, presume a grant of the right in question. (*Venkataramana Rao J.*)

NAGARATHNA MUDALIAR vs. SAMI PILLAI & ANR.

71 M.L.J. 187 = 59 Mad. 979 = 164 I.C. 764 = 1936 M.W.N. 426 = A.I.R. 1936 Mad. 682

Cutting of grass from barren land if can amount to exclusive user or possession.

Prescription—(Contd.)

The mere cutting of grass or similar acts of user in an area of barren land cannot amount to such an exclusive possession as to entitle a person to be given a decree for possession on the basis of his possessory title. (*Agha Haidar, J.*)

BLJA SINGH vs. SHIB SINGH.

A.I.R. 1936 Lah. 669 = 165 I.C. 191.

Raiyatwari land held by tenants under Government—title by prescription, if can be acquired by one tenant against another.

Where raiyatwari land is held by several tenants under the Government, one tenant can acquire title by prescription or lost grant against another, for the estate of a raiyatwari proprietor is an estate in the soil, and possession is with him though the property may be said to be in the Government. A raiyatwari proprietor has a sufficient estate to support a grant of an easement. He would be a 'capable grantor' as understood in English law for the application of the doctrine of lost grant. (*Venkataramana Rao J.*)

NAGARATHNA MUDALIAR vs. SAMI PILLAI & ANR.

71 M.L.J. 187 = 59 Mad. 979 = 164 I.C. 764 = 1936 M.W.N. 426 = A.I.R. 1936 Mad. 682.

PRESIDENCY SMALL CAUSE COURT ACT (XV OF 1912).

Sec. 19—Property attached by Madras City Court suit to release property, if can be brought in the Civil Court.

A suit to release certain movable properties from attachment made by an order of the Madras City Civil Court cannot be entertained by the Presidency Towns Small Cause Court, because if such suit succeeds, it would involve the setting aside of an order made by the City Civil Court over which the Small Cause Court has no jurisdiction or control. (*Cornish J.*)

PALANI MUDALIAR & ORS. vs. KAVERI AMMAL & ANR.

A.I.R. 1936 Mad. 551 = 1936 M.W.N. 790.

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)

Secs. 7, 23 & 30—*Composition scheme—Payment of composition secured in specified manners—Right, title and interest in immovable properties conveyed to trustees—Properties, if vested in the trustees.*

A composition scheme which was accepted by the creditors and approved of by the Court, provided that trustees should be appointed to carry out the compositions and that the payment of compositions should be secured in certain specified manners. One such manner indicated being that "the insolvent and the official assignee will convey by sufficient document to the said trustees their right, title and interest in their immovable properties." *Held*—even when there has not been any conveyance by a sufficient document by the insolvent or the Official Assignee to the trustees within the meaning of the composition, still, the approval of the composition vested the property, *ipso facto* in the trustees. (*Lord Williams, J.*)

Re :—TULSIDAS KISSEN DOVAL.

Experte :—CHHAJURAM CHOWDHURY & ORS.

40 C.W.N. 1029.

Secs. 7, 23 (1) & 30 (1) & (2)—*Annulment of adjudication on approval of composition under Sec. 23 (1), if ipso facto vests properties in person appointed by Court—Vesting order, if necessary—Court's power to make subsequent vesting order under Secs. 7 & 30 (2).*

The effect of Sec. 23(1) of the Presidency Towns Insolvency Act—in cases where adjudication is annulled on the approval a composition by Court—is that upon the Court making an appointment within the meaning of that section, the property of the debtor *ipso facto* vests in the person or persons appointed. The section does not require that the Court should make a separate vesting order. Even if a vesting order is necessary it is quite within the power of the Court to make it at any subsequent stage—after the acceptance of the composition by the Court—acting under the powers conferred on it

Presidency Town Insolvency—(Contd.)

by Secs. 7 & 30(2), Presidency Town Insolvency Act. (*Lord Williams J.*)

Re :—TULSIDAS KISSEN DOVAL.

Experte :—CHHAJURAM CHOWDHURY & ORS.

40 C.W.N. 1029.

Secs. 9 (g) & 13 (4)—*Declaration of inability to pay debt, if act of insolvency—Notice of suspension, how to be given—oral and written notices of suspension—Effect.*

A mere declaration of inability to pay does not of itself constitute an act of insolvency. Under Sec. 9 (g) Presidency Towns Insolvency Act, the debtor must not only show that he is unable to pay his debts must also declare to the knowledge of the creditor his intention of not paying his debts. Where a debtor in his application for adjudication alleges a written as well an oral notice of suspension of payment, and the notice is found to be very formal, the oral notice which is found to be in the form of a conversation between the parties cannot be relied upon by the debtor as constituting a notice to the creditor of the debtor's intention not to pay. (*McNair J.*)

KANAHYALAL BHARGAVA & ORS. vs. BANWARI LALL & ORS.

A.I.R. 1936 Cal 269.

Sec. 13 (4) (b)—"Other sufficient cause"—meaning of.

The words "other sufficient cause" in Sec. 13 (4) (b), Presidency Towns Insolvency Act should not be construed *ejusdem generis* in relation to the earlier part of the section. The widest possible interpretation should be put on these words. (*Mockett J.*)

J. MCIVOR vs. ALAGAPPA CHETTIAR.

A.I.R. 1936 Mad. 27.

Secs. 17, 46 & 51—*Debt barred on date of adjudication but not barred on date of act of insolvency—such debt, if can be proved.*

Under Sec. 46 (3) of the Presidency Towns Insolvency Act, a creditor can prove

Presidency Town Insolvency—(Contd.)

a debt which was barred by limitation at the date of the order of adjudication, but was not so barred at the date of the act of insolvency on which the adjudication was founded, Under Secs. 17 & 51. the insolvency commences on the commission of the act of insolvency, and at that date the property of the insolvent vests in the Official Assignee, whose duty it is to administer it, and distribute it amongst the creditors who prove their debts. As from that date, the Indian Limitation Act has no application, and the relationship between debtor & creditor ceases to exist. (*Beaumont C. J. & Blackwell J.*)

BYRAMJI BOMANJI TALATI vs. OFFICIAL ASSIGNEE.

60 Bom. 444 = 161 I.C. 738 = 38 Bom. D.R. 71 = A.I.R. 1936 Bom. 130.

Sec. 25—Order under the section—High Court, if will interfere with discretion of trial judge.

Where the trial Judge in exercise of the discretion vested in it under Sec. 25, Presidency Towns Insolvency Act according to the principles laid down for the exercise of such discretion, has cancelled a protection order granted by it, the High Court will be slow to interfere with the exercise of such discretion. (*Page C. J. & Ba U J.*)

B. MEYER & CO., LTD., vs. ARNOLD JACOB AORAN.

A.I.R. 1936 Rang. 329.

Sec. 39 (1) (c)—Dividend when payable by Official Assignee—method of calculation.

When the Official Assignee has sufficient assets in his hands to pay (or complete the payment of) a dividend of not less than four annas in the rupee, he ought to declare and pay such dividend. In calculating the dividend he ought to take as his basis of calculation (a) the actual amount of the admitted proofs of those creditors who have proved, whatever may be the amounts for which they are included in the Schedule; (b) the actual amounts appearing in the

Presidency Town Insolvency—(Contd.)

Schedule in respect of all other classes of claimants against the estate, unless he shall have had actual notice that they dispute such amounts and (c) such other contingent matter as are provided for by the Act. (*Bround J.*)

J. T. H. LANGFORD, IN THE MATTER OF.

14 Rang. 374.

Sec. 39 (1) (c) & 69 (1)—Certain amount of debt proved by creditor—debtor's schedule showing large sum—duty of Official Assignee.

Under Sec. 69 (1.) Presidency Towns Insolvency Act, a dividend can only be paid to creditor who has proved his debt and it is only by virtue of his position acquired by proving that a creditor can receive a dividend at all. As therefore a dividend can only be calculated upon the amount of an admitted proof, the official assignee is bound in the case of each creditor who proved to look to the amount of his proof and to nothing else notwithstanding that creditor's name may appear in the debtor's schedule for a large sum. (*Bround J.*)

J. T. H. LANGFORD, IN THE MATTER OF.

14 Rang. 374.

Sec. 40—Application for discharge—Attendance by insolvent in person, if necessary.

The attendance of the insolvent at the hearing of an application for discharge is requisite for the due hearing and consideration of the application and the failure of the insolvent to appear on the day fixed for the hearing of his application for discharge amounts to a failure to appear in the High Court on the day fixed for his attendance. (*Page C. J. & Sen J.*)

M. F. BHAIYAT vs. ABDUL MAJID.

161 I.C. 590 = A.I.R. 1936 Rang. 62.

Sec. 51—Petition by creditor for declaring another insolvent—time within which must be filed.

Presidency Town Insolvency—(Contd.)

Under Sec. 51, Presidency Towns Insolvency Act, a period of 3 months is given within which a petition may be filed. The creditor is not bound, immediately an act of insolvency comes to his knowledge, to take action. (*Mockett, J.*)

J. McIVOR & ANR. vs. ALAGAPPA CHETTIAR.

A.I.R. 1936 Mad. 27 = 70 M.L.J. 545 = 162 I.C. 722.

Sec. 52—Property acquired by insolvent after adjudication—suit by insolvent in respect of it, maintainable—right of official receiver to intervene.

The property of an insolvent divisible among the creditors under Sec. 52 (1) (a), Provincial Insolvency Act, comprises all such property as may be acquired by or devolve on him before his discharge. But unless the Official Assignee intervenes, so as to assert Sec. 52, Presidency Towns Insolvency Act, a right to divide amongst the creditors of the insolvent property which has been acquired by the insolvent after adjudication, such after acquired property may be dealt with by the insolvent himself, and third parties may acquire it from the insolvent. But what is required for constituting intervention must naturally take its colour from the nature of the property. When the property consists of a right of action and there is already a suit pending, then the proper course is for the Official Assignee to apply to be made a plaintiff in the suit and to be given the conduct of the suit. Where the official receiver takes no steps to be brought in the suit, or to have its conduct, but subsequently when the adjudication order is announced, he disclaims any interest in the subject matter of the suit, there is no intervention by him at all so as to prevent the insolvent from maintaining the suit. (*Tyabji J.*)

PORONAMCHAND PROTAPJI vs. MOTILAL KAPURCHAND.

60 Bom. 69.

Sec. 52—Money deposited with insolvent for safe custody, if divisible among creditors.

Presidency Town Insolvency—(Contd.)

For the purpose of Sec. 52, Presidency Towns Insolvency Act, a trustee means any one in fiduciary capacity. A person receiving money for safe custody holds the same in a fiduciary capacity. Therefore an insolvent with whom money is deposited for safe custody, holds the money in a fiduciary capacity, and as such, such money is not divisible among the creditors of the insolvent. 60 I A. 208 & 32 Mad. 68, distinguished; 36 Mad. 499 explained. (*Mockett, J.*)

KUSHDAN KHAN KABULI vs. OFFICIAL ASSIGNEE. MADRAS.

A.I.R. 1936 Mad. 21 = 160 I.C. 303.

Sec. 52 (2) (b) — Father in joint Hindu family adjudicated insolvent—Official Assignee selling certain joint family property—sons suing for partition, if entitled to partition property already sold.

Under Sec. 52(2)(b), Presidency Towns Insolvency Act, on the father of a joint Hindu family being adjudicated insolvent, his power to sell the joint family property including the sons, interest therein for his antecedent debts, these not having been incurred for immoral or illegal purposes vests in the Official Assignee. Therefore, if the Official Assignee in exercise of this power sells the joint family property, then the sons cannot in a subsequent suit for partition of the joint estate claim partition of the property sold by the Official Assignee. (*Lord Thankerton J.*)

SAT NARAIN vs. SRI KISHEN DAS.

40 C.W.N. 1382 = 1936 O.W.N 681 = A.I.R. 1936 P.C. 277 = 17 Lah. 644 = 17 Pat. L.J. 717 = 64 C.L.J. 80 = 38 P.L.R. = 976 = 164 I.C. 6 = 38 Bom. L.R. 1129 = 71 M.L.J. 812 (P.C.)

Sec. 55—Conveyance by insolvent—Circumstances in which its validity can be challenged.

In order that a transfer by an insolvent should be excluded from the operation of Sec. 55, Presidency Towns Insolvency Act there are two essential elements in the transaction which must be proved:—(1) that it was made bonafide and (2) that it was made

Presidency Town Insolvency—(Contd.)

for valuable consideration. If the Official Assignee proves that the transfer was made within two years of the insolvency and also that it was made either not bonafide or without valuable consideration, he is entitled to obtain an order setting aside the transfer upon the ground that it has been proved that the transfer under consideration does not contain both the elements that are requisite for its validity as against him and therefore that it fails to be set aside under Sec. 55. (*Page C. J. & Mya Bu J.*)

OFFICIAL ASSIGNEE vs. SUBALA DAS.

A.I.R. 1936 Rang. 98 14 Rang. 109 = 161 I.C. 435.

Sec. 55—*Application to set aside transfer by insolvent—onus of proving want of good faith and of consideration, on whom placed.*

In an application to set aside a transfer by an insolvent under the provisions of Sec. 55 of the Presidency Towns Insolvency Act, the onus lies on the Official Assignee to prove that the transfer was not made in good faith or for valuable consideration. This rule of law is not quite fair, in view of the fact that under Sec. 106, Evidence Act, when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. The burden of proving want of good faith or of valuable consideration should be placed on the transferee from the insolvent, 9 Rang 170 and 12 Rang. 105 followed. (*Page C. J. & Mya Bu J.*)

OFFICIAL ASSIGNEE, RANGOON vs. FATIMA BIBI.

14 Rang. 103.

Sec. 55—*Transactions void for want of consideration—onus.*

The onus of proving that a transfer by an insolvent was not made in good faith and for valuable consideration lies on the Official Assignee, 9 Rang. 170 (P. C.) followed. (*Mc. Nair J.*)

GIRISH CHANDRA SEAL, IN THE MATTER OF

A.I.R. 1936 Cal. 212 = 162 I.C. 650 = 40 C.W.N. 1012.

Presidency Town Insolvency—(Contd.)

Secs. 56 & 57—*Proof of intention to prefer inability to pay debts, if necessary to establish fraudulent preference Transfer under pressure, if protected.*

Transfer of properties by an insolvent by means of an assignment and a conveyance, in order to be a fraudulent preference, must be made with the view of giving a creditor a preference over other creditors and it must be shown that at the time when the transfer was made the transferor was unable to pay his debts. Where there was no evidence to show that the debtor was unable to pay his debts at the time of the transfers and it was obvious that the transfers were made under pressure, namely, to avoid a sale in execution of a decree after properties had been attached, held, the transfers were not liable to be set aside being protected by Sec. 57 of the Presidency Towns Insolvency Act. (*Lort Williams J.*)

Re:—HIRALAL MANDAL.

40 C.W.N. 1031.

Sec. 62—*Disclaimer of leasehold by Official Assignee effect of Vesting order under Sec. 66, whether necessary—Mortgage or sub-lease, whether would affect consequence of disclaimer.*

As between the lessor and the lessee the effect of a disclaimer of a leasehold by the Official Assignee under Sec. 72 of the Presidency Towns Insolvency Act is that the lease is determined as from the date of such disclaimer and the reversion becomes accelerated; there is no need for a vesting order under Sec. 66 in favour of the lessor though he may require delivery of possession and can prove against the insolvent's estate for such damages, if any, as he may sustain by the disclaimer. A mortgage or a sub-lease by the lessee would not affect the consequences of a disclaimer as between the lessor and lessee inter se. (*Mukherjee Jack JJ.*)

SATYAPRIYA GHOSAL vs. BARID BARAN MUKHERJEE

63 Cal. 1123 = 43 C.W.N. 846.

Secs. 75 & 85—*Insolvent applying for money to defend criminal charge against*

Presidency Town Insolvency—(Contd.)

him—Official Assignee joining with him—order for payment out of insolvent's estate—in support Sec. 75 explained—Insolvency Rules Or, 14 r. 3.

A Court of power under Sec. 75 and 85 of the Presidency Insolvency Act to order for payment of money to the insolvent out of his estate in order to enable him to defend himself in a criminal case brought against him. When the Official Assignee joins with the insolvent in such application, he acts, under Or. 14, r. 3, of the insolvency Rules. (*Stone J.*)

ALGAPPA CHETTIAR vs. OFFICIAL ASSIGNEE.

59 Mad. 862=70 M.L.J. 563=1936 M.W.N. 171=43 M.L.W. 432=161 I.C. 947=A.I.R. 1936 Mad. 414.

Sec. 99—*Joint Hindu family carrying on business, if constitutes a "firm".*

A Joint Hindu family carrying on a business as such is not a "firm" within the meaning of that term as used in Sec. 99, Presidency Town Insolvency Act and the members of the family are not "partners" of such a "firm." (*Page Mya Bu J.*)

CHIDAMBARAM CHETTYAR vs. MUTTAYA CHETTYAR.

A. I. R. 1936 Rang. 160=162 I. C. 184.

Sec. 113—*Calcutta High Court rules—facts to be taken into consideration.*

In an insolvency matter so long as the rules indicated a particular from the Procedure, the Court should observed that procedure. Under rule 81 of the Calcutta High Court rules made under Sec. 113, the Court has to take into consideration not only facts contained in the petition and the affidavit in support of it, but also any oral evidence that may be tendered at the hearing. (*McNair J.*)

KANHYALAL BHARGAVA vs. BANWARI LALL.

A.I.R. 1936 Cal. 269.

PRESIDENCY TOWNS INSOLVENCY RULES, CALCUTTA.

R. 17—*Right of an adjudication creditor to bring proceedings to set aside fraudulent transfers—Leave of Court if necessary.*

The practice in the Calcutta High Court is that an adjudication creditor who has prove his debt and who satisfies the Court that the Official Assignee has refused to make an application for setting aside an alleged fraudulent transfer may with the leave of the Court himself make it. Where no leave of the Court has been obtained the person so applying has locus standi to make the application. (*Lord Williams J.*)

Re:—HIRALAL MANDAL.

40 C.W.N. 1031.

PRINCIPAL AND AGENT.

Ratification, doctrine of—applicability.

The first essential to the doctrine of ratification, with its necessary consequence of relating back is that the agent shall not be acting for himself but shall be intending to bind a named or ascertainable principal. Where the agent puts some of the principal's money in his pocket, the agent cannot be deemed to have taken the money for himself as agent for the principal, and there can be no question of ratification by the principal. (*Lord Maugham.*)

IMPERIAL BANK OF CANADA vs. MARY VICTORIA BEGLEY.

1936 A.W.R. 937=1936 A.L.J. 944=1936 M.W.N. 844=44 M.L.W. 128=163 I.C. 295=A.I.R. 1936 P.C. 193.

Ratification—Essentials for establishing a case of ratification.

In order to establish a case of rectification it is essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact the party consciously by an overt act agreed to be bound by it, or by acquiescence in the situation arising thereafter allowed the business to continue. In either event it appears that the consciousness of the act done by the agent without authority must be proved,

Principal and Agent—(Contd.)

and secondly it should be proved that after notice of such unauthorised act the principal adopted the transaction. (*Beaumont C. J. & B. J. Wade J.*)

T. R. PRATT (BOMBAY) LTD. vs. E. D. SASSOON & CO. LTD.

60 Bom. 326 = A.I.R. 1936 Bom. 62 = 37 Bom. L.R. 978 = 161 I.C. 120.

Commission Agent with authority to canvass—Implied authority to collect money—Inference—Payment to agent, whether a defence as against principal.

A commission Agent, who has authority to canvas goods is deemed to have implied or ostensible authority to receive money for the goods sold and the payment to him operates as a valid discharge of the debt due to the principal for the price of goods sold. (*Venketaramana Rao J.*)

PEGATRAJU KRISHNA RAO vs. YANATI SUBBA REDDI.

70 M.L.J. 570.

Director of joint stock company borrowing money without authority—Money used by the company—Promise to repay if may be implied.

When an agent borrows money for a principal without the authority of the principal but the principal takes the benefit of the money so borrowed or when the money so borrowed has gone into the coffers of the principal the law implies a promise to repay. The lender has not advanced the money as a gain but has given as a loan, and the principal having received the benefit of the money, the law implies a promise to repay. There is nothing in law which makes this principle inapplicable to the case of a joint stock company when the borrowing power of the company itself is unlimited. The position would be that the principal (the company) through its agent (the director) or the managing agents had borrowed money which the principal had not authorised the agents to borrow. However, the money having been borrowed and used for the benefit of the principal either in paying the debts or for its legitimate busi-

Principal and Agent—(Contd.)

ness, the company cannot repudiate its liability to repay on the ground that the agents had no authority from the company to borrow. When these are established a claim on the footing of the money had and received would be maintainable. (*Beaumont C. J. & B. J. Wade J.*)

T. R. PRATT (BOMBAY) LTD. vs. E. D. SASSOON & CO. LTD. & ANR.

60 Bom. 326 = A.I.R. 1936 Bom. 62 = 37 Bom. C.R. 978 = 161 I.C. 120.

PRIVATE INTERNATIONAL LAW.

Cause of action, if ground of jurisdiction.

Cause of action is not a general ground of jurisdiction recognised by private International Law; and no foreign judgment can be regarded as a judgment given by a Court of competent jurisdiction on the ground that the cause of action arose within its jurisdiction and by the local law of the foreign State concerned. A Court may entertain a suit for which the cause of action arose wholly or in part within its jurisdiction. (*R. C. Mitter, J.*)

CHORMAL BALCHAND vs. KASTURI CHAND SERAOGI.

40 C.W.N. 591 = 63 Cal. 1053 = 93 C.L.J. 175.

Territorial Legislation if may confer power to try a suit against non-resident foreigner owing no allegiance—Court, if may entertain suits against foreigners subject to some sovereign power.

No territorial legislation can give jurisdiction which any foreign court ought to recognise against absent foreigners who owe no allegiance or obedience to the power which so legislates. But whether the non-resident foreigner is subject to the same sovereign power which legislates, the latter may confer power on the Court to try against such foreigner a suit for which the cause of action arose within its jurisdiction, but there must be an express provision to such effect. (*R. C. Mitter, J.*)

CHORMAL BALCHAND vs. KASTURI CHAND SERAOGI.

44 C.W.N. 591 = 63 Cal. 1033 = 63 C.L.J. 175.

Private International Law—(Contd.)

Grounds of jurisdiction to entertain personal actions.

In a personal action a foreign court has jurisdiction in an international sense if (1) the defendant is the subject of the foreign country in which the judgment has been delivered; or (2) he was a resident in that foreign country when the action began, or (3) he in the character of a plaintiff has selected the forum in which he is afterwards sued; or (4) he had voluntarily appeared in that court and submitted to his jurisdiction; or (5) he had contract to submit himself to the foreign for in which the judgement was obtained. (*R. C. Mitter J.*)

CHORMAL BALCHAND vs. KASTURI
GRAND SERAOGL.

40 C.W.N. 591 63 Cal. 1033 = 63 C.L.J.
175.

PRIVY COUNCIL.

Appeal—Appellant who has abandoned plea in lower Court, if can raise the same in Privy Council appeal.

An appellant who at the time of trial abandoned or did not press an issue, cannot be allowed to rely on the same in an appeal preferred by him before the Privy Council (*Lord Maugham.*)

CENTRAL BANK OF INDIA LTD., vs.
GUARDIAN ASSURANCE CO., LTD.

1936 O.W.N. 432 = 162 I.C. 539 = 1936
M.W.N. 812 = 64 C.L.J. 90 = A.I.R.
1936 P.C. 179 (P.C.)

Appeal—mere mistake of procedure or admission of improper evidence or misappreciation of evidence, if entitles Privy Council to interfere.

The Judicial Committee of the Privy Council is not a Court of Criminal appeal. They can advise the the sovereign's intervention criminal cases only where injustice of a serious and substantial character has occurred and therefore cannot do so in cases of mere mistake of procedure on the part of the Courts below or mere misappreciation

Privy Council—(Contd.)

of evidence, where such matters had not caused substantial injustice. (*Lord Roche.*)

INAYAT KHAN vs. EMPEROR.

17 Lah. 488.

PROCEDURE.

Rules of procedure, how far inflexible.

The Courts have to observe the rules of procedure, but they must always remember that procedure is only ancillary to the primary object for which the Courts exist, namely, administration of justice between parties. Therefore, in order to do substantial justice between the parties the High Court while exercising its power of superintendence under Sec. 107, Government of India Act, can interfere in matters judicially. (*Agha Haidar J.*)

PREMAN SINGH vs. BANARSHI DAS.

38 L.L.R. 438 = 161 I.C. 645 = A.I.R.
1936 Lah. 141.

Ordinary procedure, if may be varied by parties by agreement.

When the Court has a general jurisdiction, parties to a proceeding may by agreement adopt a procedure different from the ordinary procedure and the Court is bound to give effect to such an agreement. (*R. C. Mitter J.*)

BANGA CHANDRA MOZUMDAR vs. NANDA
KUMAR MOZUMDAR.

40 C.W.N. 1402.

Court's duty to decide all important points in appealable cases.

In appealable cases, the Court must pronounce its opinion on all important points so that a remand may not be necessary. (*Nasim Ali & Edgely JJ.*)

MOHAMMED ISMAIL & CO., vs. SACH-
HIDANANDA BHATTACHARYA.

40 C.W.N. 769.

Non joinder of parties—effect of—Court's power to deal with the defect.

Procedure—(Contd.)

No action is liable to be defeat by reason of the misjoinder or non joinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. All objections for want of parties should be taken at the earliest possible opportunity and in all cases a defect of necessary parties may be dealt with by the Court at any stage. (*Lord Roche*)

ABDUL CADER vs. AHAMADO LEBBE
MARIKAR.

38 P.L.R. 242 = A.I.R. 1936 P.C. 51 =
43 M.L.W. 184 = 160 I.C. 711.

Plaintiff if bound to state the law under which he is entitled to relief.

A plaintiff cannot be held to blame for not pleading the law under which he claims to have a decree. If the plaintiff has stated his facts it is for the Court to apply the law if the facts are found to be proved. (*King C. J.*)

SPECIAL MANAGER, COURT OF WARDS,
BALARAMPUR ESTATE vs. SHYAM LALL.

1936 O.W.N. 536 = 162 I.C. 836 = A.I.R.
1936 Oudh. 324

Papers compulsorily inclusive in part I of a Paper-book in High Court Appeal and papers inclusive in part I or Part II if and when may be allowed to be excluded.

Papers, for example, deposition which under r. II of Chap. IX of the Appellate Side Rules, 1935, must compulsorily be included in Part I of the paper-book of an appeal from original decree, and other papers, the inclusion of which in Part I or Part II is necessary for the purpose of the appeal as taken, may be allowed to be excluded on condition that the appellant will be precluded from challenging any finding dependent on those papers. *D. N. Mitter & Peterson JJ.*)

PROKASH CHANDRA NAG. vs. SUBODH CHANDRA NAG.

40 C.W.N. 383.

Procedure—(Contd.)

Party becoming of unsound mind during pendency of suit—procedure.

When a person becomes incapable of protecting his own interest by reason of unsoundness of mind, it is the duty of the Court to take such steps as may be necessary to have them protected. The Court should proceed to appoint the next friend to continue the proceedings on behalf of the lunatic or to adjourn the proceedings to a reasonable time in order to enable a suitable honest friend to come forward. (*Backet, J.*)

DEOKARANDAS RAMBILAS FIRM vs.
DEBI SAHAY.

A.I.R. 1936 Lah. 7 = 164 I.C. 646.

Suit for declaring that alienation by debt, invalid and involves forfeiture—issue of forfeiture coming up, right to re-enter declared if alienee remains in possession—plaintiff obtaining possession in execution of decree—mortgagor, if entitled to recover possession on appeal in same suit or bound to bring separate suit.

The plaintiffs sued for a declaration that a usufructuary mortgage executed by the defendant was invalid on the ground that the lands were part of an impartible zemindar and further prayed that the lands having been forfeited by alienations he was entitled to re-enter. At the trial the issue as to forfeiture was abandoned. The court held that the plaintiff could recover possession only if the mortgagee was allowed to remain in possession by the mortgagors. In execution of the decree the plaintiff obtained possession. The defendant having appealed and having prayed for recovery of possession objection was taken that they could only recover possession by a separate suit. Held, that the issue of forfeiture having been abandoned by the plaintiff, the defendant was entitled to recover possession in the same suit. (*Sir John Wallis.*)

BRAJA SUNDAR DEV vs. RAMCHANDRA PAIKARA,

15 Pat. 153 40 C.W.N. 298 = 1936
O.W.N. 292 = 160 I.C. 670 = 17 Pat.L.T.
53 = 19 N.L.J. 70.

PROMISORY NOTES

Jurisdiction—Assignment of pronote within jurisdiction, if the most essential part of the cause of action.

Promissory Notes—(Contd.)

In a suit by the assignee of a promissory note, the making of an endorsement which affects the assignment, is not only a part of the cause of action, but is the most essential part thereof. 22 Cal. 451 relied on. (*Derbyshire C. J. & Costello J.*)

BHABANI PRASANNA LAHIRI vs. RADHICA BHUSAN ROY.

40 C.W.N. 1349.

Pronote written on leaves of the book of the plaintiff—question whether book kept in regular course of business, if material.

Where the plaintiff sues on a pronote which is written on one of the leaves of his *bahi*, and the pronote is proved to be genuine, the suit must be dismissed. The question of the book not having been kept on the regular course of business is immaterial (*Mohammed Noor & Rowland JJ.*)

BARHAMDEO SINGH vs. KARI SINGH.

A.I.R. 1936 Pat. 498=165 I.C. 809.

Pronote not admissible in evidence—Suit on independent cause of action, if maintainable,

If a promissory note is inadmissible in evidence on account of its being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of the promissory note. It is not necessary that there should be an independent contract prior to the execution of such a promissory note. The fact that money had been lent implies a promise to repay it and the plaintiff in such a case has a cause of action on the implied promise which is independent of the promissory note. (*R. C. Mitter, J.*)

INDRA CHANDRA BAG vs. HIRALAL RONG.

40 C.W.N. 696=62 C.L.J. 545=A.I.R. 1936 Cal. 127.

Oral Transfer of pronote, if valid in Punjab.

Although the proper mode of assignment of pronote is by endorsement only, yet in

Promissory Note—(Contd.)

the Punjab there can be oral assignment of a pronote because the technical provision relating to the assignment of choses in action contained in the T. P. Act are not strictly applicable in the Punjab. (*Agha Heidar J.*)

BRIJ LAL vs. DHANNARAM.

A.I.R. 1936 Lah. 547=164 I.C. 271.

Pronote signed by agent on behalf of himself and his principal—body of pronote indicating no agency—principal, if may be made liable.

A pronote signed by a person on his own behalf and on behalf of his principal contained the words "I so and so hereby promise and agree to pay, etc." It was contended that the wording of the pronote indicated that the signatory alone was to bound in his individual capacity, and the principal could not be made liable. Held, that the note was a joint and several one, executed by the agent both in his individual capacity and his capacity as an agent, and there was nothing to preclude the agent from signing as such. The principal was therefore equally liable under the pronote (*Venataramana Rao J.*)

P. V. GOVINDAN vs. THAVARAYIL KINATHI NARAYAN & ORS.

70 M.L.J. 467=1936 M.W.N. 241=43 M.L.W. 371=162 I.C. 258=A.I.R. 1936 Mad. 417.

Note executed in favour of two persons whether one can bring a suit.

The plaintiff was one of two brothers in whose favour a handnote was executed by the defendant. He brought the suit for the recovery of the debt without making his brother a party to the suit, or mentioning in the plaint the fact that the handnote was executed in favour of the two brothers jointly. On the defendant objecting to the suit, held, under Sec. 45, Contract Act, the right to claim performance of the promise rested with the two brothers jointly. The plaintiff not having sued as Karta of the family, the suit was liable to be dismissed. (*Saunders J.*)

MUNSHI SAHU vs. BHUPAL MAHTO.

A.I.R. 1936 Pat. 274=163 I.C. 405=37 C.L.J. 848=17 Pat. L.T. 879.

Promissory Notes--(Contd.)

Renewal of—former note not delivered nor cancelled—effect of.

Where a promissory note is renewed and the maker dispenses with the delivery back of the former note, or where it is made clear that the parties understand that the claim on the former note is extinguished, there is no failure of consideration, merely because the former note was delivered up to the maker or otherwise cancelled, (*Panckridge J.*)

BANGSHIDHAR GOPALKA vs. A. C. BANERJEE.

40 C.W.N. 130.

Suit for recovery of money lent on promissory note not sufficiently stamped—Independent cause of action—Plaintiff, if should prove independent contract to repay.

When a plaintiff bases his suit for recovery of money lent on a cause of action independent of a promissory note which was executed, but is inadmissible owing to its being insufficiently stamped, he has not got to prove that there was an express promise to repay independent of the note, because, when as a matter of fact, money is lent, there is an implied promise to repay. (*R. C. Mitter J.*)

MAHATABUDIN MIA vs. MAHAMMAD NAJIR JODDAR.

40 C.W.N. 473.

Promissory note executed for purchase money of goods sold—pronote found unstamped—seller if can recover purchase money independently of the note.

The plaintiff sold certain goods to the defendant, who executed a pronote in favour of the plaintiff for the price of the goods. The pronote was found to be unstamped and therefore inadmissible in evidence. *Held*, that the presumption was that the note was given as only a conditional payment for the goods delivered and the plaintiff had a right of action in respect of the price of the goods independently of the pronote, and therefore that fact that the pronote was unstamped and therefore, inadmissible in evidence, did

Promissory Notes—(Contd.)

not in any way affect the plaintiff's right to recovery the purchase money. (*Beasely C. J. Cornish & Pandrang Row JJ.*)

RAMASAMI PILLAI vs. MURUGIAH PADAYACHI & ANR.

59 Mad. 268 = 70 M.L.J. 267 = 161 I.C. 273 = 1936 M.W.N. 855 = A.I.R. 1936 Mad. 179.

PROVIDENT FUNDS ACT (ACT IX OF 1897)

Sec. 4—Money in provident funds—liability to attachment.

As soon as the money deposited in a Provident Fund reaches the hands of the depositor or employee on withdrawal, it can be attached in execution of a decree. When therefore a school teacher presented an application countersigned by the Head master of the school for withdrawal of in provident Funds dues from the Post Office Savings Bank where the money was in deposit, and his agent who withdrew the money handed it over not to teacher but to the Head Master and the money was thereupon attached by a creditor, *held*, that the money was not exempt from attachment. (*R. C. Mitter J.*)

RUKMINI KUMAR BHATTACHARJI vs. ASSAM BENGAL LOAN CO., LTD.,

40 C.W.N. 1406.

PROVINCIAL INSOLVENCY ACT (V OF 1920.)

Provisions of the Act, if can be affected by C. P. Code.

The Provincial Insolvency Act is a special law and in the absence of any specific provision to the contrary, the Civil Procedure Code cannot limit or otherwise affect the provisions of the Insolvency Act. Where the Insolvency Act specifically provides appeals and revisions in particular manner only, any action taken in appeal or revision under the C. P. Code will not be subject to the provisions of the Insolvency Act, but will be in contravention of those provisions. (*Collister & Bajpai, JJ.*)

WALI MOHAMED vs. HIGAN LAL.

58 All. 639 = 161 I.C. 311 = 1936 A.L.J. 9 = 1936 A.W.R. 61 = A.I.R. 1936 All. 89.

Provincial Insolvency Act—(Contd.)

Secs. 2, 28(2) & 59—*Insolvency of father of a Hindu joint family—Receiver, if can sell share of insolvent's son.*

The power of a Hindu father to sell the joint family property including the interest of his son, is not "property of the insolvent" which by Sec. 28 of the Provincial Insolvency Act vests in the Receiver on the insolvency of the father and which by Sec. 59 he is empowered to sell for distribution among the creditors. The son's share does not itself vest in the Receiver on the insolvency of the father; and since the disposing power of the latter in respect of the shares of other members of the joint family, not being his 'property' such disposing power does not vest in the Receiver either, and sale by him of the son's share is without jurisdiction. (*Agarwalla & Varma JJ.*)

NILKANTHA TEWARI vs. DEBENDRA-NATH ROY.

15 Pat. 363 = 161 I.C. 167 = 17 Pat. L.T. 39 = A.I.R. 1936 Pat. 115.

Sec. 3—*Scope of the section—Jurisdiction of High Court in insolvency proceedings if excluded.*

Sec. 3, Provincial Insolvency Act merely enacts that the ordinary jurisdiction in insolvency shall be in the District Courts. It does not exclude the extraordinary civil jurisdiction of the High Court. (*Young C. J. & Montee J.*)

PEOPLES BANK OF NORTHERN INDIA LTD. vs. HARKISSEN LAL.

38 P.L.R. 1103 = 163 I.C. 378 = A.I.R. 1936 Lah. 408.

Sec. 4—*Minor's property sold by receiver in insolvency, if may be restored.*

Where a property was taken possession of and sold by the receiver-in-insolvency, and the insolvent could not raise any objection due to fact of his minority, the Court can, under Sec. 4 of the Insolvency Act, do justice by restoring to the minor his property. The reason is that a minor cannot be legally adjudged insolvent, and as such his property cannot legally vest in the Official Receiver and all action taken by

Provincial Insolvency Act—(Contd.)

him as receiver are therefore null and void. (*Mosely & Mackney JJ.*)

PIARA LAL vs. AMIR CHAND.

A.I.R. 1936 Lah. 376 = 162 I.C. 481.

Sec. 4—*Application by creditor to enquire into bonafides of a transfer by insolvent—Power of the Court.*

Where an insolvent transferred certain immovable properties before he filed an application for insolvency and one of the creditors thereupon applied to the Court for enquiry into the bonafides of the transfer, held, that the Court had jurisdiction to make such enquiry at the request of the creditors. (*Mosely & Mackney JJ.*)

MAUNG BA E vs. MAUNG KYI.

A.I.R. 1936 Rang. 54 = 161 I.C. 687.

Secs. 4 & 28(2)—*Jurisdiction of insolvency Court, if exclusive—Sec. 28(2), if limited to proceedings against insolvent.*

The suit or other legal proceedings contemplated in Sec. 28(2) of the Provincial Insolvency Act has reference to a suit or proceedings against the insolvent himself or against persons whom it is sought to render liable through him. Even if the claim could have been made in the insolvency proceeding still the suit is not barred on the principle of *res judicata*, the jurisdiction of the Insolvency Court under Sec. 4 of the Act, not being exclusive. 64 All. 16 relied on. (*Panchridge J.*)

BRIJMOHAN vs. MAHABIR.

63 Cal. 194 = 40 C.W.N. 808.

Sec. 4 & 53—*Power of insolvency Court to annul sale deed executed more than two years before date of petition.*

Sec. 4 Provincial Insolvency Act does not give to the Insolvency Court a wider power than that which is contained in Sec. 53. Provincial Insolvency Act to annul transfers executed more than two years before the date of petition. Therefore, a decree for partition obtained and a sale deed executed by an insolvent in favour of his son more than two years before the date of petition to be adjudged an insolvent can-

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not be annulled by the Insolvency Court either under Sec. 53, Provincial Insolvency Act or under the General Powers given to the Insolvency Court under Sec. 4 of the said Act. (*Nanavutty & Smith JJ.*)

GOMTI PRASAD & ORS. vs. CENTRAL NAZIR DIST. JUDGES COURT, RAI BAREILLY & ANR.

1936 O.W.N 960.

Secs. 4 & 53—*Gift by insolvent in favour of wife by registered deed, if can be challenged by creditors.*

Where a gift of a room was made by an insolvent in favour of his wife for her maintenance by registered deed, and the gift was sought to be set aside on the ground that it was made fraudulently with the object defeating creditors, *held* that as the gift consisted of a small room only, it should not be said that the creditors were prejudiced in any way by the same, and the gift further having been made by a registered deed, it must be presumed that the creditors were aware of it and the gift therefore should not be said to have been made fraudulently or with intent to defeat the claims of the creditors. (*Bhide J.*)

MST. JUMNA DEBI vs. OFFICIAL RECEIVER, CAMPBELLPUR.

38 P.L.R. 67=163 I. C. 956=A.I.R. 1936 Lah. 593.

Sec. 6(e) & (h)—"Decree for payment of money"—*Meaning of.*

Clauses (e) and (h) of Sec. 6 of the Provincial Insolvency Act must be construed to have the same meaning. Under cl. (h), the phrase 'for the payment of money' means a decree which has been passed personally against the individual concerned and does not include a decree for sale, at the foot of a mortgage. (*Thomas J.*)

BAIJNATH vs. GAJADHAR PRASAD & ANR.

11 Luck. 61.

Secs. 6, 10 & 25 (2) *Application by debtor for adjudication - Creditor alleging*

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that applicant able to pay his debts—Court, if bound to take further evidence.

An application was made by a debtor for being adjudicated an insolvent. The creditors opposed the application on the ground that although the debtor had been arrested once in execution, yet there was no reason to believe that he was unable to pay his debts or was unwilling to pay the same. *Held*, that under the circumstances the Court was bound to take evidence tendered to it and then to pass an order refusing to adjudicate the debtor an insolvent, if the Court came to that conclusion. (*Mosely & Ba U JJ.*)

RAMDEO vs. PREETAN SINGH & ORS.

A.I.R. 1936 Rang. 108=161 I.C. 588.

Sec. 24—*Petition by person claiming to be a creditor—Right of other creditors to contest petition on the ground that petitioner is not a creditor.*

Where an insolvency petition is presented by a person claiming to be a creditor of the debtor, it is open to any other creditor of the debtor to contest the petition on the ground that the petitioner is not a creditor of the debtor. (*Jaisil J.*)

MST. CHAND KAUH vs. OFFICIAL RECEIVER.

38 P.L.R. 729=A.I.R. 1936 Lah. 499=163 I.C. 393.

Secs. 24 (a) & 25—*Court, if bound to hear creditor's evidence before passing order of adjudication on debtor's application.*

In dealing with an application by a debtor for an adjudication in insolvency, the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross-examined and if the judge is satisfied after such hearing he may refuse to hear any further evidence and may grant the adjudication, but this is very far from saying that the judge, if he shall be inclined to hear any evidence presented by the creditor is not entitled to hear such evidence. He may, if he likes hear the evidence and may hear as much evidence as he may think fit in the circumstances, which will vary of course according to

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the difficulty of the case, (*Courtney Terrell C, J., Dhavle & Agarwalla JJ.*)

MD. ALUM vs. BABULAL MARWARI.

15 Pat. 177.

Sec. 28 *Right of insolvent to property which he had beneficial rights at the time of his applying for insolvency.*

When a debtor is adjudicated an insolvent at his instance, all his assets which he had at the time of the presentation of the application and all assets which he may acquire before his final discharge must come in the hands of the Court in order that the said assets may be administered and his creditors whose debts can be proved in the Insolvency proceedings may get their debts pro-rata from these assets. Hence an insolvent has no title in property in which he had beneficial rights at the date of the presentation of the application or which was acquired subsequently by him at any time before his absolute discharge. All such properties vest in the Court or in the receiver appointed by the Court. (*R. C. Miller J.*)

ARJUN DAS KUNDA vs. MARCHIA TELINI.

A.I.R. 1936 Cal. 434.

Sec. 28 *Right of Official Receiver to dispose of insolvent's property.*

The object of Sec. 28, Provincial Insolvency Act is to secure for the Official Receiver the unrestricted right to dispose of an insolvent's property, and it is to preserve that right that suits and other proceedings aimed at the insolvent's property are prohibited. 39 Mad. 689 & 56 M. L. J. 489 referred to, (*King J.*)

VENKATARAMYIA vs. ABBURI VIRAYYA.

160 I.C. 423 = A.I.R. 1936 Mad. 57 = 1936 M.W.N. 77 = 43 M.L.W. 204

Sec. 28 (2) *Suit to recover money from firm adjudged insolvent without obtaining leave of Court, if barred.*

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A suit for the recovery of a sum of money from a firm adjudged insolvent is barred by the provisions of Sec. 28 (2), Provincial Insolvency Act where no leave of the Court is obtained for its commencement by the plaintiff. (*Srivastava J.*)

GANGA DIN GUR PERSHAD vs. JAGMOHAN SINGH.

1936 O.W.N. 52 = 160 I.C. 229 = A.I.R. 1936 Oudh. 236.

Sec. 28 (1) *Judgment-debtor adjudged insolvent, if can be arrested in execution of decree.*

A decree-holder can execute his decree by arrest of the judgment-debtor after the latter has been adjudged and insolvent provided he obtains the leave of the Insolvency Court. Where no such leave is obtained, an application for execution by the arrest of the judgment-debtor may be disallowed. (*Srivastava & Zia-ul-Hasan, JJ.*)

SANKAR LAL vs. PERCHARAM.

1936 O.W.N. 56 = 160 I.C. 33 = A.I.R. 1936 Oudh. 177.

Sec. 28(2) *Suit against grandson for grandfather's debts—parties—insolvency of father of defendants—effect of*

A, as karta of a joint Mitakshara family business agreed to pay a certain debt. After his death, his son B having been adjudged an insolvent, the creditors sued C, a son of B for recovery of the debt. In such suit neither B nor his receiver in insolvency were made parties. Held, that Sec. 8(2), Provincial Insolvency Act had no application to the suit; and neither B nor his receiver in insolvency were necessary parties to the suit. (*Panckridge J.*)

BRIJMOHAN vs. MAHABIR.

63 Cal. 194.

Secs. 28(2), (4) & 7 *Property acquired between date of petition and of adjudication and between adjudication and discharge in whom vests.*

Under the Provincial Insolvency Act, property acquired by the insolvent or devel-

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ving upon him between the date of of his presenting the petition for adjudication and the date on which the order of adjudication is passed, vests in the Court or Receiver under Sub-Sec. (2) read with Sub-Sec. (7) of the Provincial Insolvency Act. Property acquired by the insolvent after his adjudication and before his discharge vests forthwith in the Court or Receiver. The decision of the Courts in England that property acquired after order of adjudication does not vest in the trustee in bankruptcy unless and until the trustee intervenes has no application in India. 54 Cal. 595, 4 Rang. 125 & 16 Lab. 392 followed; 8 Pat. 478 dissented from; 44 Bom 673 distinguished. (*Beaumont C. J. & Wadia J.*)

GIRIKANT SHIVLAL PANDYE vs. VIDIAL VRIJLAL SHAH.

60 Bom. 141 = A.J.R. 1936 Bom. 164
= 162 I.C. 253 = 38 Bom. L.R. 211.

Secs. 28, cls. 2 & 7—Order of adjudication—when it takes effect.

An order of adjudication relates back to the date when the application for insolvency was admitted and the effect of the two clauses of Sec. 28 is that the property of the insolvent, wherever they may have been and whoever may have been in possession of them, automatically vests in the Court. It is immaterial whether there was at that time any receiver appointed by the Court or not. (*Courtney Terrell C. J. & Khaja Mohammed Noor J.*)

TEJ MAL MARWARI vs. JOKHI RAM SURAJ MAL.

17 P.L.T. 313 = 160 I.C. 146 = A.J.R. 1936 Pat. 112.

Sec. 28 (4) and Pensions Act (xxii of 1871)—Sec. 11—Pension of insolvent, if available for distribution amongst creditors.

The pension granted by the Government to a person for past services, is not available for distribution among the creditors of the pensioner on his being adjudicated an insolvent, by virtue of Sec. 28, Sub-Sec 5 of the Provincial Insolvency Act read

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with Sec. 11 of the Pensions Act. (*Guha & Lodge JJ.*)

PURUSOTTAM SINGH vs. SATYENDRA CHANDRA GHOSH, MAULIK.

40 C.W.N. 142 = 164 I.C. 747.

Sec. 33 (3)—Creditor, if can prove debt after final discharge of insolvent.

Sec. 33 (3) Provincial Insolvency Act prevents a creditor from proving his debt after the insolvent has been given a final discharge. (*Robert C. J. & Baguley J.*)

BANK OF CHETTINAD LTD. vs. KO TIN & ANR.

14 Rang. 529 = 164 I.C. 1061 = A.J.R. 1936 Rang. 339.

Sec. 37—Property of insolvent vesting in Receiver—powers of the Court over the property.

When the property of an insolvent is vested in the Official Receiver under Sec. 37, Provincial Insolvency Act, it is the Insolvency Court which retains control of it, and it is the Court which must direct its disposal in the interests of the general body of creditors. (*Curgenven & King JJ.*)

YERUVA CHINNAPA REDDI vs. P. V. SRINIVASA RAO GARU.

59 Mad. 62.

Sec. 37—Appointee under the section, if can maintain execution proceedings against a transferee of the insolvent's property, when order annulling transfer passed prior to the annulment of the adjudication.

The words "all acts theretofore done" in Sec. 37, Provincial Insolvency Act are applicable to an order setting aside a transfer by the insolvent, even though the Receiver has not recovered the property from the transferee before he ceases to act as such on account of the annulment of adjudication and the property has become vested in an appointee. After the adjudication order has been annulled, an appointee under Section 37 can institute and maintain an execution proceeding against a trans-

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ference of the insolvent's property when the order annulling the transfer was passed prior to the annulment of the adjudication. (*Baguley & Co. U. J.J.*)

OFFICIAL RECEIVER, MANDALAY *vs.* SUCCARAM.

14 Rang. 63.

Sec. 37—*Property vested in Official Receiver—Adjudication subsequently annulled but no order passed under Sec. 37—Power of the Receiver to deal with the property after annulment.*

The Official Receiver has no power to deal with property vested in him after adjudication has been annulled in the absence of an express order to that effect by the Insolvency Judge. The effect of annulment of adjudication is that the condition with regard to property which existed immediately before the passing of the adjudication order is restored unless, of course, an order under Sec. 37 vesting the property in a person appointed by the Insolvency Judge has been passed. (*Jasral J.*)

SHAKAR KHAN *vs.* ISWAR DAS.

38 P.L.R. 273=160 I.C. 994=1936 A.L.J. 44=1936 A.W.R. 41=A.I.R. 1936 All. 102.

Sec. 37—*Appointee, if can distribute assets of debtors.*

An appointee constituted under Sec. 37, Provincial Insolvency Act has no power to distribute the assets of the debtor. He is not a necessary party to a suit in respect of debts proved in insolvency before annulment. He is not even a proper party. His only duty is to be the custodian of the property, so that it may be attached in his hands when decrees are obtained against the debtor. 11 Rang. 287 relied on. (*Mosley & Co U J.J.*)

SEEMA *vs.* R. K. BANERJEE & ANR.

A.I.R. 1936 Rang. 338=164 I.C. 412.

Sec. 38—*Interpretation—Court's power to reduce interest on proposal of insolvent, when creditors object.*

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Where the proposal of the insolvent for payment of a lesser rate of interest than the contractual rate is objected to by all the creditors in a body, the Court has no option but to refuse to give its approval to the proposal, because the fulfilment of the conditions laid down in sub cl. 2 of Sec. 38, is a condition precedent to the acceptance of a proposal by the Court. 24 A. I. J. 441 distinguished; 54 Mad. 823 relied on. (*Collier & Bajpai J.J.*)

SHANKAR LAL *vs.* HAKIM SAYED ALI AHMAD.

1936 A.W.R. 41=A.I.R. 1936 All. 102=106 I.C. 994=1936 A.L.J. 44.

Secs. 41 & 42 (1) (a) *Court when may order discharge of insolvent.*

The provisions of Sec. 42 (1) (a), Provincial Insolvency Act, are imperative, and it is the duty of the Court before passing a final order of discharge to satisfy itself that the insolvent whose assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, avows that it is not due to his fault that his assets do not reach that percentage. The burden of proof lies on the insolvent, and if he fails to satisfy the Court in this respect, the insolvent Court has no jurisdiction to pass an order of discharge; neither can it do so in the absence of any evidence on the records (*Grille J. C.*)

BAKARAM *vs.* KAWDER.

160 I.C. 35=31 N.L.R. 13=A.I.R. 1936 Nag. 17.

Sec. 42 (1)—*Order of discharge, if should be refused where there is no prospect of raising eight annas in the rupee.*

Where the insolvency proceedings have been dragging on for many years and the income of the insolvent being at starvation point, there is no prospect of the insolvent coming into any property which can be taken over by the Receiver for liquidating the debts, an order of discharge should not be refused to the insolvent merely because eight

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as, in the rupee have not been realised.
(*Agha Haidar J.*)

SHIVDEO SARAN vs. KIDAR NATH & ORS.

38 P.L.R. 218=164 I.C. 1087=A.I.R. 1936 Lah. 840

Sec. 47—*Secured creditor receiving dividend on his entire debt—presumption of relinquishing security.*

Where a secured creditor has not only given proof of the whole debt but has actually received a dividend on the whole debt the correct view to take is that the creditor had relinquished his security, because, unless he did, so, he had no right to take the step which he did of proving the debt, and still less, any right whatever to receive the dividend which he did receive.
(*Addison & Abdul Rashid JJ.*)

PADAM PROSAD vs. FIRM MITTARSAIN GANESHI LALL & ORS. AND FIRM RAJA RAM BRAHMANAND.

38 P.L.R. 414=164 I.C. 540=A.I.R. 1936 Lah. 690.

Secs. 51 & 52—*Application to sell property after admission of petition for insolvency—erroneous order permitting sale—effect of—purchaser in good faith, if protected.*

The judgment debtors whose property had been attached in execution of a decree applied for being adjudicated insolvents and the Court appointed an interim receiver to take possession of the property. In the meantime an application by the attaching decreeholder for the sale of the property having been made, the receiver and the insolvent judgment debtor applied for stay of the sale under Sec. 52, Provincial Insolvency Act. The judge refused the prayer and the property was sold and purchased by a third party. On an application for setting aside the sale, held, that the sale ought to have been stayed on the application of the interim receiver and the order of the executing Court refusing to do so was wrong. But the sale having been held, the purchaser who took the property in good

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faith obtained a good title, which held good against the Official Receiver as well.
(*Venkata Subba Rao & Cornish JJ.*)

MUTHAN CHETTIAR & ANR. vs. VENKITUSWAMI NAICKEN.

59 Mad. 928=17 M.L.J. 170=1936 M.W.N. 753=A.I.R. 1936 Mad. 819.

Secs. 51 & 52—*Execution of decree pending insolvency proceedings—right of creditor to benefit from execution.*

Sec. 52, Insolvency Act provides that when execution is issued against an property of a debtor and the execution Court is informed that any insolvency petition against the debtor has been admitted, the Court on application shall direct the property to be made over to the receiver if it is in the possession of the Court. If the property is actually sold, the effect of such sale can only be to protect a bonafide purchaser but it will have no effect upon the rights of the creditor. (*Courtney Terrel C.J. & Khaja Mohammed Noor J.*)

TEJ MAL MARWARI vs. JOKHI RAM SURAJ MAL.

17 P.L.T. 313=160 I.C. 146=A.I.R. 1936 Pat. 112.

Secs. 51 & 52—*Joint family property attached in execution of a decree against father personally and against other members in respect of their shares subsequent insolvency of father—sale proceeds of the decree, if can be claimed in whole by Official Receiver.*

The family property of a joint Hindu family was attached in execution of a decree obtained against the father and manager of the joint family personally and against his son and nephew in respect of their shares in the joint family property. Subsequently the father was adjudicated an insolvent, and the Official Receiver who took charge of his properties, claimed that he was entitled to the whole of the amount realised by the sale of the attached property. Held, that the Official Receiver was not entitled to claim that portion of the sale proceeds which represented the shares of the insol-

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vent's son and nephew, because once the decrees against the son and nephew had been followed by attachment of their interests, the normal power of the manager to alienate it for payment of his debts from the moment of attachment ceased to be his right. After the right in him had ceased, it could not be transferred on his insolvency to the Official Receiver. (*Stone & Pandrang Rao JJ.*)

OFFICIAL RECEIVER, EAST GODAVARI
vs. IMPERIAL BANK OF INDIA, RAJAH
MUNDRY & ANR.

59 Mad. 996.

Secs. 51, 52 & 74—Order requesting withdrawal of attachment of property made by another Court, if warranted.

The respondent whose salary had been attached by an order of the Calcutta Small Causes Court applied to the Additional District Judge of Howrah to have himself adjudicated an insolvent and also applied for the withdrawal of the attachment. On that application the Additional District Judge addressed the Registrar of the Calcutta Small Causes Court requesting him to withdraw the attachment and to make no further attachment. *Held*, that the judge had no jurisdiction to do so. (*Henderson & Khondkar JJ.*)

G. C. CHAKRAVARTY vs. E. WHITE.

63 Cal. 535=40 C.W.N. 336.

Sec. 52—Receiver, if includes interim receiver.

Sec. 52, Provincial Insolvency Act clearly contemplates the presentation of an application under that section before the adjudication of insolvency, and therefore it is clear that the word "receiver" in that section must include an interim receiver, who would be the only receiver in existence before adjudication. (*Pollock A. C. J.*)

LUXMI OIL MILLS CO. vs. SUKHDEO
KANHAIYA LAL FIRM.

31 N.L.R. (Supp.) 212=161 I.C. 661=
A.I.R. 1936 Nag. 120.

Secs. 52, 49 & 221—Son's interest in ancestral property in the hands of his fa-

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ther, if vests in the Receiver on the father being adjudicated an insolvent.

Under the provisions of the Provincial Insolvency Act, the interests of a Hindu son, in the ancestral property, does not vest in the Receiver, on his father being adjudicated an insolvent; nor does the father's right to sell the interests of his son in the joint family property for satisfying his own debts, vests in the Receiver. 49 Mad. 849; 50 Mad. 135; 13 Lah. 464; 53 All. 239; 55 Bom. 110 & 9 Luck. 304, dissented from. (*Agarwala & Varma, JJ.*)

NILKANTHA NARAYAN TEWARI vs.
DEBENDRA NATH ROY.

15 Pat. 383=17 P.L.T. 39=A.I.R. 1936
Pat. 115=161 I.C. 167.

Sec. 53—Court after enquiry declaring part of the transfer made by insolvent as void and annulling same—Validity of the order.

A creditor of an insolvent having applied to the Court for enquiring into the bonafides of a transfer by the insolvent, the Court after enquiry came to the conclusion that part of the transfer complained of, was void and directed it to be set aside. *Held*, that the order of the Court was wrong in that where a transaction was ab-initio a nullity, it cannot be formally annulled; it can only be declared invalid. Annulment applies to voidable transactions such as those lying under Sec. 53. Provincial Insolvency Act which are good until avoided and annulled. (*Mosley & Mackney JJ.*)

MAUNG BA E. vs. MAUNG KYI.

A.I.R. 1936 Rang. 54=161 I.C. 687.

Sec. 53—Fraudulent transfer by insolvent—Burden of proving want of good faith, on whom lies.

When the Official Receiver makes an application under Sec. 53, Provincial Insolvency Act for avoiding a transfer made by the insolvent, the burden of proving that the transfer had not been made in good faith, is on the Official Receiver. The mere fact that there are suspicious circumstances regarding the transfer is not sufficient to

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prove the fraudulent nature of the transaction or of its being without consideration. (*Jailal, J.*)

LALJE vs. BASHESHAH NATH.

38 P.L.R. 212.

Sec 53—Onus of proving validity or otherwise of transfer, on whom lies.

Under Sec. 53, Provincial Insolvency Act, the onus lies on the person challenging the bonafides of the transfer and not on the transferee to prove that the transfer was not made in good faith or for valuable consideration. (*Macpherson & Khaja Mohammed Noor JJ.*)

TIRATHRAJ TIWARI vs. FIRM SHYAM SUNDAR BALKISHEN,

17 P.L.T. 626=164 I.C. 838.

Sec. 53—Transaction, if for consideration and in good faith—Onus of proof.

The onus of proving that a transaction is not in good faith and for consideration and as such voidable under Sec. 53, of the Provincial Insolvency Act lies on the person who asserts that it is so, but where no prejudice on account of the reversal of the procedure is found the Court may decline to interfere with the judgment of the Court below. (*Guha & Bartley JJ.*)

BANKIM CH. MAITI vs. DINESH CH. ROY CHOWDHURY

40 C.W.N. 731.

Sec. 24—Mortgage executed by insolvent prior to adjudication in favour of a creditor to secure previous and fresh advance Fictitious sums forming part of consideration—Mortgage if liable to be annulled.

Where prior to their adjudication as insolvents, the insolvents took a fresh advance from one of their creditors and executed a mortgage of their immovable property in his favour to secure the sum previously due to him together with the fresh advance, and two fictitious amounts also formed part of the consideration so that the total amount

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of the mortgage money be nearly equal to the value of the property, and the other creditors may not be able to recover their debts to any appreciable extent by sale of the equity of redemption, *held*, that on these facts the case was one in which the insolvents transferred practically the whole of their immovable property with a view to given preference to one of their creditors over others, and the mortgage was liable to be annulled under Sec. 54, Provincial Insolvency Act. (*Nanavutty JJ.*)

ABDUL SATTAR vs. ONKAR NATH.

1936 A.L.J. 698 1936 A.W.R. 585=
A.I.R. 1936 All. 489.

Sec. 57—Interlocutory order, if a "decision".

The word "decision" as used in Sec. 57, Provincial Insolvency Act has an element of finality so far as a particular Courts is concerned. An interlocutory order of a Court cannot therefore be said to be a decision within the meaning of the section. (*Colleston & Bajpai JJ.*)

WALI MOHAMED vs. HIGAN LAL.

58 All. 639=161 I.C. 311=1936 A.L.J.
9=1936 A.W.R. 61=A.I.R. 1936 All.
80.

Secs. 57 & 59—Secretary of State, if liable for wrongful acts of Official Receiver.

The Secretary of State of the Government is not liable in tort or otherwise for the consequences of wrongful acts of Official Receivers in the discharge of their duties under the Provincial Insolvency Act. (*Niamatullah & Allsop JJ.*)

SECRETARY OF STATE FOR INDIA vs. CHANDMAL.

1936 A.W.R. 34=1936 A.L.J. 79=
A.I.R. 1936 All. 89=160 I.C. 1025.

Secs. 58 & 59 (e)—Order for costs in favour of insolvent and against creditor—estate in hands of Receiver—death of in-

Provincial Insolvency Act—(Contd.)

solvent and Receiver—right of heirs to execute order for costs.

An order for costs in favour of an insolvent was made against his creditors. At the time of the order, the insolvent's estate was in the hands of a Receiver. Subsequently both the insolvent and the Receiver having she died, the heirs of the insolvent sought to execute the order for costs. *Held*, that on the death of the Receiver, the insolvent's estate vested in the insolvency Court, and the order for costs could not be executed by the insolvent, or on his death pending insolvency, by his heirs as agent under Sec. 59 (e), Provincial Insolvency Act, without the leave of the Court on an application in that behalf. Mere leave to execute the order was not sufficient to entitle the heirs of the deceased insolvent to cloth them with title to execute the decree. (*Pankridge J.*)

CHHATRAPAT SINGH DUGAR vs. KHARAJ SINGH LACHMIRAM.

A.I.R. 1936 Cal. 521.

Secs. 68 & 75—Application for setting aside mortgage by Receiver—Limitation—Order, if appealable.

An application by the insolvent for setting aside a mortgage effected by the Receiver after the discharge of the insolvent on the ground that the Receiver was at that time *functus Officio*, and had no right to the property mortgaged, falls under Sec. 68, Provincial Insolvency and must be made within 21 days from the date of the mortgage. An order passed on such application by a Judge subordinate to the Dist. Judge is appealable to the Dist. Judge, but no second appeal lies from it to the High Court. But the High Court has ample power to interfere with such an order in revision where the act of the Receiver was clearly *ultra vires*. (*Bhide J.*)

ABDULLA vs. SHANKER DAS & ANR.

38 P.L.R. 233 = 160 I.C. 921 (2) = A.I.R. 1936 Lah. 502.

Sec. 75—Appeal or revision to High Court from interlocutory order passed by

Provincial Insolvency Act—(Contd.)

District Judge in appeal pending before him if maintainable.

No appeal or revision lies to the High Court from an interlocutory order of a District Judge passed in an appeal pending before him from a decision of the Subordinate Judge having insolvency Jurisdiction. 61 I. C. 5. 9 dissented from; 14 C. W. N. 586 & 56 I. C. 449 distinguished. (*Collister & Bajpai JJ.*)

WALI MAHAMAD vs. HIGAN LAL.

1936 A.W.R. 61 = 1936 A.L.J. 9 = A.I.R. 1936 All. 8 = 58 All. 639 = 161 I.C. 311.

Sec. 75—Interference by High Court with findings of District Judge, when justified.

The High Court should not ordinarily interfere in revision with the findings arrived at by the District Judge in the exercise of its insolvency Jurisdiction unless the order is manifestly perverse or palpably wrong. (*Thomas J.*)

BAIJNATH vs. GAJADHAR PROSAD.

11 Luck. 61.

Sec. 75 (1)—Insolvency petition filed by creditor, dismissed—Appeal—death of debtor pending appeal—Legal representatives if may be brought on record—order, if appealable.

An order passed by a District Court to the effect that the legal representative of a deceased debtor should be brought on record, in an appeal from an order in an insolvency petition presented by a creditor, is only an interlocutory order, and no second appeal lies from it. (*Collister & Hajpai JJ.*)

WALI MUHAMMED vs. HINGAN LAL.

58 All. 639 = 161 I.C. 311 = 1936 A.L.J. 9 = 1936 A.W.R. 61 = A.I.R. 1936 All. 80.

PROVINCIAL SMALL CAUSE COURT ACT (IX OF 1887)

Sec. 15 & Sch. II, Cl. 8—Judge of Small Cause Court if need be invested by

Provincial Small Cause Court's Act—(Contd.)

name in order to try suit for rent other than house rent.

In a notification under Cl 8. of the Second Schedule of the Provincial Small Cause Courts Act, it is not necessary to confer powers by reference to the name of a particular Judge of a Court of Small Causes in order to enable him to try suits for the recovery of rent of homestead land under the Small Cause Court Procedure. (*Mukherji Jack, D. N. Mitter, S. K. Ghose & Patterson JJ.*)

BEJOY KUMAR ADDY vs. NAGENDRA NATH PALIT.

40 C.W.N. 942 = 63 C.L.J. 455 = A.I.R. 1936 Cal. 497 = 164 I.C. 226

Sec. 17—Discretion of court allow time to defendant for depositing security.

The provisions of Sec. 17, Provincial Small Cause Courts Act as regards the deposit of the amount due from the defendant under the decree are directory and not mandatory, and it is open to the Court in appropriate cases to extend time within which the deposit is to be made. These words do not however give an unlimited license to the defendant and are no justification for his not depositing the amount for an indefinite period. (*Agha Haidar J.*)

BARKAT RAM vs. SUGGAR ELECTRIC STORES, LUDHIANA.

A.I.R. 1936 Lah. 140 = 161 I.C. 518 (1)

Sec. 17—Application to set aside ex-parte decree—security bond by applicant considered insufficient—fresh security bond filed after expiry of limitation, if can be accepted.

Where an applicant seeking to have an ex-parte decree against him set aside filed a security bond within the period of limitation, but the security offered being found insufficient the Court directed him to file another security bond which however was done after the expiry of the period of limitation prescribed by Art. 164 of the Limitation Act, held, that the second security bond was to be treated as a part of the same transaction and the application for setting

Provincial Small Cause Court's Act—(Contd.)

aside the ex-parte decree could not be rejected on the ground of failure to furnish security within the prescribed, period 47 All. 728 and 57 All. 402 relied on. (*Srivastava A. C. J.*)

MAHABIR vs. SHEO SARAN.

1936 O.W.N. 688 = 164 I.C. 470 = A.I.R. 1936 Oudh. 407.

Sec. 17—Delay in making deposit if can be condoned.

A defendant against whom a decree was passed ex-parte applied for setting aside the same on furnishing security. The Court ordered the deposit of decretal amount and payment of costs to the decree-holder as a condition precedent to the setting aside of the ex-parte decree. Money was not deposited within the period fixed and the applicant asked for extension of time to make the deposit. Held, that the Court had jurisdiction to order extension of time for sufficient reason as the period for payment could not be deemed to be an essential part of the decree. (*Allsop J.*)

KHIALI RAM vs. BUCHARAM.

A.I.R. 1936 All. 371 = 162 I.C. 909 = 1936 A.W.R. 220.

Sec. 17 (1), Proviso—Surety for performance of ex-parte decree—ex-parte decree set aside—surety, if liable for subsequent decree on merits.

A surety under the Proviso to Sec-17(1) Provincial Small Cause Courts Act, 1887, is automatically discharged when the ex-parte decree is set aside and the mere fact that at a subsequent stage another decree is passed on the merits is no ground for making the surety liable to pay the amount under the second decree. (*Sulaiman C. J.*)

TULSI MISIR vs. BINDESHRI MISIR.

1936 A.L.J. 933 = 1936 A.W.R. 644 = A.I.R. 1936 All 593 = 163 I.C. 570.

Sec. 17 (1), Proviso—Words "the decree" occurring in the last portion of the

Provincial Small Cause Court's Act.—(Contd.)

proviso if can refer to may other decree except to exparte decree.

The words "the decree" in the last portion of the proviso to Sec. 17 (1), Provincial Small Cause Court Act' refer to the decrees previously mentioned in the proviso, viz., the exparte decrees. These words cannot mean any other decrees which may eventually be passed in that suit. (*Sulaiman C. J.*)

TULSI MISIR vs. BINDHSHRI MISIR.

1936 A.L.J. 953 = 1936 A.W.R. 644 =
A.I.R. 1936 All. 593 = 164 I.C. 570.

Sec. 25—Powers of the High Court under the section.

Section 25, Provincial Small Cause Courts Act confers a discretion on the High Court to interfere in revision, but in exercising such discretion, the High Court will not whenever possible error of law has been made, call for the record and pass an order thereon. (*Wort J.*)

RAM SUNDAR SAHU vs. SAKHI SAHOO.

159 I.C. 1075 = A.I.R. 1936 Pat. 132.

Sec. 25—Interference by the High Court with the decision of the trial Court when justified under the section.

The question whether the decision of the trial Court should be interfered with or not by the High Court under Sec. 25, Provincial Small Cause Courts Act depends on the facts and circumstances of each particular case. The revisional powers of the High Court under the section are to be exercised only when it appears to the Court that some substantial injustice to a party to the litigation directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. Where the decision of the Judge of the trial Court is an eminently just decision, the High Court should not interfere merely because of some technical error in law. (*Nanavatty J.*)

LAL JOGENDRA BUX SINGH vs. ANDREWS A. FERNS.

1936 O.W.N. 332 = 161 I.C. 423.

Provincial Small Cause Court—(Contd.)**Sec. 20—Circumstances in which the High Court will interfere in revision.**

The High Court should not ordinarily exercise its discretionary powers in revision under Sec. 25, Provincial Small Cause Courts Act, if no injustice has been done. The question whether interference should be made or not depends upon the facts and circumstances of each case. Even when the question involved is one of limitation, the High Court should not interfere with the decree of the lower Court if it is satisfied that such interference far from furthering the ends of justice would perpetuate an injustice. 13 All. 277 followed, (*Srivastava & Nanavatty JJ.*)

C. P. CLARK vs. AZIZ KHAN.

1936 O.W.N. 330 = 161 I.C. 389 =
A.I.R. 1936 Oudr. 247.

Sec. 25—Munsiff having small cause court powers trying suits within his pecuniary limit in ordinary file—Right of appeal if can be claimed.

If a suit of a small cause court nature is tried by a Munsiff in his ordinary file, that is to say, not as a small cause court Judge, but the Munsiff has the powers of a small cause court Judge to try suits of that value, his decision must be taken to be a decision of a small cause court and there would be no appeal, but the remedy of the aggrieved party would be by way of motion under Sec. 25 of Provincial Small Cause Court's Act. (*R. C. Mitter J.*)

BANKIM CHANDRA DEB SARKAR vs. MADAN MOHAN DEB SARKAR.

40 C.W.N. 698.

Sec. II, Art. 8—Some co-sharers transferring right to recover rent—suit by transferee to recover rent realised by non-transferring co-sharer if maintainable in Small Causes Court.

Some co-sharers transferred their right to recover their share of rent from the tenants. The transferee instituted a suit against the non-transferring co-sharer alleging that he had realised rent payable to the transferring co-sharers by the tenant. Held, the suit was maintainable in the Small Cause Court, because it was not a claim for im-

Provincial Small Cause Courts Act—(Contd.)

movable property nor profits arising therefrom. (*Jai Lal J.*)

SATRAM DAS vs. SHDHU SINGH.

A.I.R. 1936 Lah. 377 = 162 I.C. 389 (1)

Sch. II, Art. 8, 31—*Suit to recover share of rent from co-proprietor—if triable by Small Cause Court—Belonging to plaintiff—meaning of.*

A suit by a co-proprietor to recover from another proprietor the share of rent payable by him, but paid by the plaintiff is cognisable by the Small Cause court. It is not excluded by Art. 8 which excepts a suit for the recovery of rent nor by Art. 31 which excepts suit for the profits of immovable property. The words "Belonging to the plaintiff" refers to immovable property, and not profits derived therefrom. (*Jai Lal J.*)

SATRAM DAS vs. SADHU SINGH.

38 P.L.R. 1084 = 162 I.C. 389 (1) = A.I.R. 1936 Lah. 377.

Sch. II, Art. 31—*Suit for price of goods plus interest and incidental expense, nature of.*

A suit for the price of goods plus interest and incidental expense is not a suit for an account within the meaning of Art. 31 of the Second schedule of the Small Cause Courts Act. It is a suit of the nature cognisable by his Small Cause Courts, and if the value of the suit does not exceed Rs. 500, no second appeal lies to the High Court in view of the provisions of Sec. 102, C. P. Code. (*Collister J.*)

PURAN LAL, RAM LAL vs. FIRM DAMODAR DAS PARMANANDA.

1936 A.W.R. 1003 = 1936 A.L.J. 1174.

Sch. II, Art. 31—*Suit for recovery of balance due out of consideration of completed sale, is cognisable by a S. C. Court.*

A suit for recovery of the balance due out of the consideration of a completed sale is within the cognisance of a Court of Small Causes. Such a suit cannot be deemed to have been converted into a suit for accounts

Provincial Small Cause Courts Act—(Contd.)

by the mere fact that the plaintiff had given the defendant a notice to go into accounts. 41 I. C. 46 relied on : 34 M. L. J. 342 distinguished. (*Bhude J.*)

ABDUL SATTAR vs. AZIZUL RAHMAN.

160 I.C. 1038 = A.I.R. 1936 Lah. 557.

Sch. II, Arts. 15 & 41—*Suit for recovery of money advanced, not for contribution—Article applicable.*

A suit for recovery of money advanced to the defendant for the purchase of certain lands jointly with the plaintiff cannot be said to be either a suit for contribution or a suit in respect of payment of money made by the plaintiff to the defendant as a co-sharer, but is a suit for recovery of money advanced. Such a suit does not fall within Art. 41 or Art. 15 of Sch. II to the Provincial Small Cause Courts Act. (*Dhavl J.*)

NISAN SINGH vs. RAMCHANDRA RAO.

162 I.C. 553 = 17 Pat. L.T. 591 = A.I.R. 1936 Pat. 429.

Sch. II, Art. 35 (ii)—*Suit to recover money value of stolen property—power of Small Cause Court to entertain.*

The plaintiff sued in the Small Cause Court to recover a sum of money which had been stolen from him and given to the defendant. The suit was not for recovery of the identical coins which had been stolen but merely for the recovery of the amount stolen. *Held*, that the suit was an unclassified one and half within the scope of Art. 35 cl. (ii) of the Provincial Small Cause Courts Act and was therefore not cognisable by a Small Cause Court. 49 All. 85 relied on. (*Tek Chand J.*)

KASHI RAM vs. DES RAJ.

A.I.R. 1936 Lah. 798 = 165 I.C. 287.

PUBLIC SUITS VALIDATION ACT (XI OF 1932.)

Secs. 2 & 3—*Suit dismissed for defect in sanction required by Sec. 93 C. P. Code, if may be restored.*

Public Suits Validation Act—(Contd.)

A suit dismissed for defect in the sanction required by Sec. 93 C. P. Code may be restored to file under the provision of Sec. 3 of the Public Suits Validation Act and when so restored the trial is to be proceeded with apart from any question of fresh consent of the Collector. (*Mukherjee & S. K. Ghosh JJ.*)

BHABATARAN CHAKRAVARTY vs. RAMLAL DAS MOHUNT.

63 C.L.J. 70=A.I.R. 1936 Cal. 815.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900)

Sec. 3—Gift of land to bonafide religious and charitable purposes—Validity of.

Sec. 3, Punjab Alienation of Land Act does not provide that if a gift is made in good faith for a religious and charitable purpose, then the Deputy Commissioner should sanction the same; on the other hand it debars the jurisdiction of the Deputy Commissioner to consider the the question of sanction in the case of a gift made in good faith for a religious or charitable purpose. Whether a gift is made in good faith for a religious or charitable purpose is for the Civil Court to decide. (*Jailal J.*)

DEPUTY COMMISSIONER, KANGRA vs. THAKAR RAMGOPAL TEMPAL.

A.I.R. 1936 Lah. 129=161 I.C. 672.

Sec. 6 - Mortgage effected before coming into force of the Act—Subsequent mortgage deed carrying interest after passing of the Act—Later mortgage if can be held to be a fresh mortgage contravening the provisions of the Act.

A certain land was mortgaged before the enactment of the Punjab Alienation of Land Act. No interest was payable on this mortgage. A second mortgage of the same properties was effected after that Act came into force. The mortgage was subject to the payment of interest. Held, that the mere fact that the second mortgage carried interest was not sufficient to hold that there was no fresh transfer or interest in

Punjab Alienation of Land Act. (Contd.)

the land contravening the provisions of the Punjab Alienation of Land Act. The mortgage was not a fresh one, as no new relationship was brought about by the second mortgage deed which only created an additional charge on the same land. (*Bhide J.*)

GILANI BUX vs. BEHARI LALL.

A.I.R. 1936 Lah. 225=163 I.C. 89=38 P.L.R. 739.

Sec. 16 - Mortgage decree for sale of land belonging to agriculturist—executing Court of can refrain from selling.

Under Sec. 16 Punjab Alienation of Land Act, land belonging to a member of an agricultural tribe could not be sold in execution even though a decree had been obtained by the mortgagee for the sale of such land. Although in the majority of cases the decree of the Court must be executed as it stands, yet, when that decree would have the effect of nullifying an act of the Legislature, the Court must hold its hand and not put to sale the property which under the Act has been rendered unsaleable. (*Addison & Rashid J.*)

CHAJJU RAM vs. MUZAFFAR AHMED.

38 P.L.R. 1065=165 I.C. 243 (2)=A.I.R. 1936 Lah. 845.

Sec. 16 (2)—Land belonging to member of an agricultural tribe, if can be leased out for more than twenty years.

The word "decree or order" can be read as "decrees or orders" there being nothing repugnant in the subject or context. Consequently, the land belonging to a member of an agricultural tribe, cannot in execution of decrees or orders of civil or revenue court be leased or farmed out for an aggregate term exceeding 20 years. (*Addison & Abdul Raschid JJ.*)

DEPUTY COMMISSIONER, MUZAFFARGARH vs. JOINT HINDU FAMILY OF TALHARAM.

17 Lah. 531=38 P.L.R. 957=160 I.C. 947=A.I.R. 1936 Lah. 545.

Punjab alienation Land.—(Contd.)

Sec. 16—*Decree directing sale of land belonging to member of agricultural tribe—legality of the sale*

The land belonging to a member of an agricultural tribe cannot be sold in execution of a decree even if the decree directs such sale. (*Jai Lal & Abdul Rashid JJ.*)

SARIB DAYAL vs. JAMALUDDIN,

38 P.L.R. 926 = 164 I.C. 752.

PUNJAB COURTS ACT. (VI OF 1918).

Sec. 41—*Certificate granted, if can be amended on the ground of an omission by over sight.*

A certificate under Sec. 41, Punjab Courts Act granted by the District Judge can be amended by him for the purpose of including a point omitted by over sight. An application for making such an amendment can be said to be a new application by the applicant for a fresh certificate on a new point raised by him. (*Jai Lal J.*)

MST. NATHO vs. GHULAM MOHAMMAD.

A.I.R. 1936 Lah. 687 = 38 P.L.R. 901.

Sec. 41—*Second appeal—certificate when not required.*

Where the question of succession to a chela was decided by the appellate Court merely on the analogy of succession to the estate of an appointed heir, and not on the strength of any evidence, held, that no certificate was required for purposes of second appeal under Sec. 41, Punjab Courts Act. (*Jai Lal J.*)

MEHR DAS vs. MUNSHI RAM.

38 P.L.R. 838 = 163 I.C. 695 = A.I.R. 1936 Lah. 920.

Sec. 41 (3)—*Question of custom not depending upon evidence but upon interpretation of customary law—certificate, if necessary for second appeal.*

Where the question of a custom does not depend upon any conflicting evidence

Punjab Courts Act.—(Contd.)

but only on the interpretation to be placed on a certain paragraph of the customary law of the district, it is doubtful whether any certificate under Sec. 41 (3) Punjab Courts Act, is necessary to enable a second appeal to the High Court to be filed. (*Jai Lal J.*)

MST. BUNDO & ANR. vs. MST. NIHALO & ORS.

38 P.L.R. 851 = A.I.R. 1936 Lah. 660 = 165 I.C. 78 (1)

Sec. 41 (3)—*Second appeal in custom case—certificate of custom—failure of appeal—costs if may be allowed.*

Where an appeal is filed on a certificate of custom being granted under Sec. 41 (3) Punjab Courts Act, the party who is unsuccessful in the appeal is not liable to be burdened with costs. (*Addison & Din Mohammed JJ.*)

BAHADUR SHAH vs. ZULFIKAR SHAH.

17 Lah. 90 = 38 P.L.R. 480 = 162 I.C. 131 = A.I.R. 1936 Lah. 767.

Sec. 41 (3)—*"Custom or Usage" meaning of.*

The words "Custom or Usage" in Sec. 41 (3), Punjab Courts Act are not to be confined to agricultural usage only but may refer to any other kind of business or transaction representing human activity and enterprise. (*Agha Haidar J.*)

RAM MAL LILO SHAH vs. KANSRI RAM.

38 P.L.R. 859 = A.I.R. 1936 Lah. 649.

Sec. 46A—*Presentation of plaint by petition writer under Power of Attorney—Validity of.*

The rules framed by the the Lahore High Court under Sec. 46A, Punjab Courts Act cannot in any way abrogate modify or alter the rules contained in Or. 3, r. 1 & 2 C. P. Code. Therefore where a plaint was presented by a petition writer under a Power of Attorney held, that the presenta-

Punjab Courts Act.—(Contd.)

tion of the plaint could not be vitiated by any rule which might have been framed under Sec. 46A, Punjab Courts Act though the petition writer could be dealt with under the rules framed by the Lahore High Court. (*Agha Haider J.*)

BRINDARAN *vs.* JAI DOYAL.

38 P.L.R. 760 = 163 I.C. 523 = A.I.R. 1936 Lah. 894.

Adoption—*Adaptor, if can ignore custom by making adoption in the Dattaka form.*

It is not open to a person making an adoption under Hindu Law to ignore the custom by which he is governed merely by adopting the Dattaka form of adoption. The effect of the ceremony would be to transplant the adoptee into the adaptor's family, but the eligibility of the adoptee would still be governed by Hindu Law modified by custom. (*Rangilal J.*)

AMARJIT SINGH *vs.* DHARAMSALA DARWAZA KITNI.

A.I.R. 1936 Lah. 219 = 161 I.C. 480.

Adoption—*Jats of Jullundur district—Person outside got, if can be adopted.*

Among the Jats of Jullundur district, a general rule of custom is that a person outside the got of the adopted cannot be adopted. (*Rangilal.*)

AMARJIT SINGH *vs.* DHARAMSALA DARWAZA KITNI.

A.I.R. 1936 Lah. 318 = 161 I.C. 489.

Adoption—*Sayads of Village Koti Khadan Shah, Tahsil Pasrum, District Sialkot—daughter's son if may be adopted in presence of collaterals of the third degree.*

The defendant who was the daughter's son of the deceased having got into the properties of the deceased on the allegation that he had been adopted by the deceased, the plaintiffs who were collaterals of the third degree sued for a declaration that the adoption of the defendant was invalid. Held, that the defendant on whom the onus

Punjab Courts Act.—(Contd.)

rested, had failed to prove that among the Sayads of Village Kotli Khadan Shah in Tahsil Pasrum, District Sialkot, the adoption of a daughter's son in the presence of collaterals of the third degree was valid by custom. (*Monroe & Rangilal JJ.*)

KHAIR ALI SHAH *vs.* IMAN SHAH.

17 Lah. 129 = 161 I.C. 634 = 38 P.L.R. 571 = A.I.R. 1936 Lah. 80.

Adoption—*Qureshis of Village Pind Sheikh Musa, District Lyallpur—validity of gift to adopted son—right of such son to succeed.*

Among the Qureshis of Village Pind Sheikh Musa, District Lyallpur no particular ceremony is necessary for an adoption, and a person may be adopted or taken as a *laipalik* son, that is, one who has been taken and reared as a son, without any ceremony. A gift made to such a son is valid, and even if a gift is not made to him, he will succeed on the death of the person who appointed him as his heirs. (*Addison & Din Mohammed JJ.*)

NUR MOHAMMED *vs.* BHAWAN SHAH.

17 Lah. 96 = 162 I.C. 854 = 38 P.L.R. 477 = A.I.R. 1936 Lah. 213.

Adoption—*Awans of Gujranwala district—Adoption, if valid.*

Among Awans of Gorse Awanan, District Gujranwala, there is no custom allowing adoption. (*Dalip Singh & Becket. JJ.*)

FEROZEDIN *vs.* FAZL QUADAR.

A.I.R. 1936 Lah. 67.

Adoption—*Sayads of Kotli Kadam Shah of Sialkot district—Adoption of daughter's son if valid.*

Among Sayads of village Kotli Khadan Shah in Tahsil Pasrum of the Sialkot district, the adoption of a daughter's son is not valid when there are available collaterals of the third degree. (*Rangilal & Monroe JJ.*)

KHAIR ALI SHAH *vs.* IMAN SHAH.

17 Lah. 129 = A.I.R. 1936 Lah. 80 = 161 I.C. 643 = 38 P.L.R. 571.

Punjab Customs Act—(Contd.)

Alienation—*Alienation for discharge of decretal debt—Enquiries that must be made by the alienee.*

Where an alienee who is an outsider finds that the alienor's debt is a decretal debt, he need not make any further enquiry, and the reversioners will be allowed to go behind the decree. This rule is however not applicable where it is clear that the alienee's suspicion should have been aroused by the surrounding circumstances, or where it is proved that he actually had knowledge of the bad faith of the decretal transaction, (*Jailal & Skemp, J.J.*)

PRITAM SINGH vs. SARJIT SINGH.

A.I.R. 1936 Lah. 112.

Alienation—*Person advancing money after making reasonable enquiry as to its necessity if also required to look to its application.*

If a person makes reasonable enquiry as to the existence of legal necessity and on being satisfied that the necessity existed he advances the money, it is no part of his duty to see to the application of the loan to the necessity. The burden in these cases is always on the transferee. The mere recital as to the existence of the necessity in the deed of transfer is very feeble evidence and Courts of justice do not ordinarily attach much weight to it. (*Agha Haidar J.*)

INDAR SINGH vs. NASIBA

A.I.R. 1936 Lah. 769 = 165 I.C. 23.

Alienation—*sale of reversionary right in widow's estate if valid.*

The sale of reversionary rights in a widow's estate is opposed to the principles of customary or tribal law and according to the principles of Sec. 6, T. P. Act, which can be taken as a guide, though the Act is not in force in the Punjab, such a transfer is void. 6 Lah 87 & 10 Lah. 613 followed. (*Bhide & Currie J.J.*)

SHER MOHAMMED KHAN vs. CHUHR SHAH.

A.I.R. 1936 Lah. 753.

Punjab Customs Act—(Contd.)

Alienation—*Alienation, if should be set aside, where only a small portion of consideration money not applied for purposes of legal necessity.*

Where sale or a mortgage by a Hindu father or manager of a joint Hindu family is established for legal necessity, the fact that the vendee or the mortgagee is unable to prove that a small portion of the consideration was applied for purposes of legal necessity, is no ground for setting aside the alienation, nor can the vendee or the mortgagee be held liable to pay to those challenging the alienation that portion of the consideration for which legal necessity is not positively established. (*Agha Haidar J.*)

INDAR SINGH vs. NASIBA.

A.I.R. 1936 Lah. 769 = 165 I.C. 23.

Alienation—*Right of Adna malik in Makhan Bala Village, Alipore Tahsil to land submerged.*

The proper interpretation to be placed on the clause in the Wajib-ul-arz of village Makhan Bala in the Alipur Tahsil relating to the rights of Adna Malik in lands which has been subject to diluvion, is that when the land is submerged, the rights of the Adna Malik are extinguished, but on its re-emergence, he is entitled to regain possession of it by paying Hag Jhori. The rate of the Jhori is not fixed and if the superior owner refuses to accept the Jhori offered by the Adna Malik, the matter is to be determined with due regard to the quality of the land and the capacity of the Adna Malik. (*Bhide J Burrie J.J.*)

KANWAR BHAN vs. BHAGAT JIWAN DAS.

17 Lah. 470 = 162 I.C. 704 = 38 P.L.R. 960 = A.I.R. 1936 Lah. 143.

Alienation—*Alienor, man of loose character—Onus of proving that the debts were due.*

If the alienor is a man of loose character, the initial onus lies on the outsider alienee to show that the antecedent debts

Punjab Customs—(Contd.)

for the purpose of paying off which the alienation was made were really due. When he has discharged that onus the turn of the opposite party then comes to show that the alienee made no proper enquiry, or that if he made one, he must have learnt of the real nature of the debts. The enquiry to be made by the alienee should refer not only to existence of the debts but should also include an enquiry as to their nature if those who challenge alienations can show that the result of the first enquiry should have raised doubts in the minds of ordinarily prudent men as to the morality or reasonableness of the debts (*Jailal & Skemp, JJ.*)

PRITAM SINGH vs. SARJIT SINGH.
A.I.R. 1936 Lah. 112.

Alienation—Abadi—Right of proprietor to control alienation where village has developed into town.

The mere fact that a village has developed to the state of a town does not justify the presumption that the village proprietors lost or abandoned their customary right of control over the alienations of sites in the village Abadi. As long as the proprietors have not acted in such a way as to show that they have no record for their proprietary rights and have abandoned them, the presumption will not be justified. (*Coldstream & Abdul Rashid JJ.*)

DHUMAN KHAN vs. GURMUK SINGH.
17 Lah. 403 = A.I.R. 1936 Lah. 394 =
38 P.L.R. 887

Alienation—Absence of provision in Wajib-ul-Arz forbidding alienations by non-proprietors—Right to alienate, if may be presumed.

The mere absence of any provision in the Wajib-ul-Arz forbidding alienation by non-proprietors will not raise any presumption that a non-proprietor has by custom a right to alienate the village site. (*Coldstream Abdul Rashid JJ.*)

DHUMAN KHAN & ORS. vs. GURMUK SINGH.

17 Lah. 403 = A.I.R. 1936 Lah. 394 =
38 P.L.R. 887.

Punjab Customs—(Contd.)

Alienation—Sale of land by resident—Objection not taken by proprietary body—Rights of the proprietary body over the remainder of the site, if extinguished.

Proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the lands sold; and while such sales would give good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished. 27 P. L. R. 653 and 82 I. C. 522 relied on. (*Coldstream J.*)

JHANDA SINGH vs. DEV SINGH.

A.I.R. 1936 Lah. 474 = 164 I.C. 238

Alienation—Right of non-proprietors in Pinanwan village to alienate house site.

A non-proprietor in a village in Pinanwan in Pind Dadan Khan of Jhelum district has no right to alienate the site of his house in the Abadi of the Revenue Estate without the consent of the proprietors of the village. (*Coldstream & Abdul Rasyid, JJ.*)

DHUMAN KHAN vs. GURMUK SINGH.

17 Lah. 403 = A.I.R. 1936 Lah. 394 =
38 P.L.R. 887.

Alienation—Brahmins—Lakhanpur—alienation of ancestral property—principles.

In the case of Brahmins, the initial presumption is that they are governed by their personal law, and it is for the party who plead custom to prove it. Lakhanpur Brahmins of village Lakhanpal Tahsil Pillour, Dist. Jalandur are governed by custom in the matter of alienation of ancestral property. 4 Lah. 254 and 5 Lah. 524 relied. (*Tek Chand & Skemp JJ.*)

ISHAR DAS vs. BHAGWAN DAS.

38 P.L.R. 1045 = 165 I.C. 507 = A.I.R.
1936 Lah. 841.

Alienation—Power of non-proprietary resident of village Sangatpura in Amritsar district to alienate his house.

Punjab Customs Act—(Contd.)

The non-proprietory resident in village Sangatpura in the Amritsar district has no power to alienate his house site in the village Abadi without the consent of the proprietary body. (*Coldstream J.*)

JHANDA SINGH vs. DEV SINGH.

A.I.R. 1936 Lah. 474 = 164 I.C. 238.

Alienation—Arians of Mozang—Daughter, if competent to alienate property.

Amongst Arians of village Mozang, daughters possess similar powers of alienation to their father's property as a male proprietor. They cannot alienate the same except for necessity. (*Addison & Abdul Rashid, JJ.*)

MT. CHIRAGH BIBI vs. UMAR DIN.

A.I.R. 1936 Lah. 594 = 165 I.C. 553.

Alienation—Mother of last male-holder making a gift of non-ancestral property with consent of next heir—Collateral if can challenge alienation.

Where the mother of the last male holder made a gift of the non-ancestral property of the last male holder with the bonafide consent of the next heir, and the alienation was subsequently challenged by a collateral, held, that the collateral had no right to contest the alienation. (*Tekchand & Abdul Rashid JJ.*)

MAKKHAN SINGH vs. MT. MANGO

A.I.R. 1936 Lah. 192 = 38 P.L.R. 705.

Alienation—Law applicable to Sodhi Khattris of Lyallpur District in matters of alienation.

Sodhi Khattris of Lyallpur District are governed in matters of alienation by their personal law, that is, Hindu Law, and not by the principles of the Customary Law prevailing in the Punjab. (*Tek Chand & Dalip Singh J.*)

BAGHEL SINGH vs. MST. DHAN KAUER.

A.I.R. 1936 Lah. 258.

Punjab Customs Act—(Contd.)

Alienation—Non-proprietor in village Basi Kalan, Hoshiarpur district, if can sell or mortgage their houses.

Among Ghair maliks of Basi Kalan of District Hoshiarpur, non-proprietors have full power to alienate their house property by way of sale or mortgage. (*Bhida & Currie JJ.*)

BAHADUR KHUN & vs. KUNDAN LALL.

A.I.R. 1936 Lah. 267 = 166 I.C. 823.

Alienation—Non-proprietor in village Chanauli, Tahsil Rupar, District Ambala, if competent to dispose of house site.

There is no custom prevailing in village Chanauli, Tahsil Rupar, District Ambala, which preclude non-proprietors of the village from disposing of the sites of their houses. (*Jai Lal J.*)

MANGAL vs. HAKIM BEHARI LAL.

A.I.R. 1936 Lah. 253 = 163 I.C. 389.

Alienation—Sale of Adna Malkiyat land—shamilat land, if conveyed—question, how to be determined.

Where a person sells certain Adna Malkiyat lands, and the question arises whether the Shamilat land is also conveyed thereby, the Court, in order to determine the question, must enquire into the surrounding circumstances and the conduct of the parties. (*Tek Chand J.*)

JESA RAM vs. GHULAM.

A.I.R. 1936 Lah. 816.

Application—Question of the existence of a particular custom and of its application to the parties in the case, if must be proved.

There is no such thing as a general custom in the Punjab, and it is necessary in every case to prove that the parties are governed by custom and what the custom is. To hold otherwise would amount to manifest injustice as custom in the Punjab is more local than tribal, though it may be both, and if there is custom prevailing in a small area or in a small tribe, that custom will always be held not proved because in most areas as amongst

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other tribes the custom is otherwise. (*Addison J.*)

BALAND vs. MST. SUBAN.

17 Lah. 232 = 38 P.L.R. 592 = A.I.R. A.I.R. Lah. 418.

Debts—Payment of antecedent debts, if constitutes necessity.

The payment of antecedent debts is a legal necessity, and a person who seeks to avoid those debts must show that they were immoral or illegal or opposed to public or contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interests of his reversioners. (*Addison & Din Mohammad JJ.*)

JHANDA SINGH vs. BAKSHIS SINGH.

38 P.L.R. 316.

Debts—Ancestral lands, if can be attached or sold to meet debts.

The reversioner or a major son who is in possession of ancestral lands, is not liable to pay the debts of the last holder out of the ancestral land which came to him through the common ancestor and such land can not be attached or sold in their hands, to meet those debts. (*Addison, A. C. J., & Din Mohammad J.*)

NARAIN SINGH vs. MALLIK AHMED YAR KHAN.

17 Lah. 133 = 38 P.L.R. 472 = A.I.R. 1636 Lah. 21.

Debts—Ancestral house property in the hands of an heir if liable for the debts of deceased.

The principle enunciated by the High Court is that ancestral property in the hands of an heir of a deceased debtor is not confined to ancestral landed property only, but extends as well to ancestral landed house property. But the said principle not being a statutory one, a party may contract himself out of it, and if he has done so, he will be

Punjab Customs Act—(Contd.)

estopped from taking protection under it. (*Coldstream J.*)

GURBAKSH SINGH vs. F. LAL CHAND DARSHAN CHAND.

38 P.L.R. 333 = 164 I.C. 690 = A.I.R. 1936 Lah. 737.

Debts—Khaggis of Lyallpur district—ancestral property in the hands of minor sons, if can be made liable for father's debts.

According to Custom prevailing in the Punjab, a son does not inherit ancestral property from his father as his legal representative but takes the steps by virtue of his connection with the common ancestor. Hence the property which a son has inherited from his father is not liable to be attached in execution of a decree against the father's estate. The provisions of Sec. 53, C. P. Code are specially enacted to meet such a case but there is no similar provision in any enactment for persons who follow custom. The question therefore has always to be decided in each case when custom is the rule of decision. Among Khaggis of Lyallpur District there is no such custom. (*Addison & Din Mohammed JJ.*)

MAHAMMED NAWAZ SHAIK vs. RAM DAYAL KARAM CHAND.

17 Lah. 139 = 38 P.L.R. 521 = 159 I.C. 1024.

Debts—Ferozepur district—Decree obtained against father—Ancestral property in hands of son, if may be attached or sold.

From the answer to question 32 of the *Riwaj-i am*, it does not appear that there is any special custom in the Ferozepur district under which ancestral property in the hands of sons are liable to be attached and sold in execution of a money decree against their deceased father. (*Abdul Rashid J.*)

LAL MOHAMED vs. KHEM CHAND RADHAKISSEN.

A.I.R. 1936 Lah. 167.

Gift—Awans of Tallaganj Tahsil, Attock district validity of ancestral property.

Punjab Customs Act—(Contd.)

Among the Awans of Tallaganj, Tahsil, District Attock, a proprietor cannot make by gift an unequal distribution amongst his sons. 25 I. C. 556 followed; 16 I. C. 21 not followed. (*Hilton & Rangilal, JJ.*)

MAHAMMAD NAWAJ KHAN vs. MANGA KHAN.

A.I.R. 1936 Lah. 59 = 163 I.C. 108 = 38 P.L.R. 743.

Gift—Hindu Jats in Ludhiana district—*Gift to daughters, if can be challenged by collaterals.*

Among the Hindu Jats of Ludhiana District, a gift by a father to his daughters of any part of his property is valid and cannot be challenged by collaterals beyond the fourth degree. (*Addison A. C. J., & Din Muhammad, J.*)

HARNAM KAUR vs. JAGAT SINGH

A.I.R. 1936 Lah. 108

Guardianship—Rajputs of Jagadhri Tahsil of Ambala district—*Proper guardian of property of a minor.*

Among Rajputs of the Jagadhri Tahsil of Ambala district, the mother is the natural guardian of the minors whether she is regarded as such under the Hindu Law or special custom or is not (*Becket J.*)

SADHURAM vs. PRITHI SINGH.

A.I.R. 1936 Lah. 220 = 161 I.C. 861 = 35 P.L.R. 291.

Marriage—Jats of garhshankar Tahsil—*marriage of father-in-law with his widowed daughter-in-law if valid.*

Jats are classed as Sudras and for the purposes of marriage they are governed by the restriction laid down in Hindu Law only into such extent as they may have adopted them as usage. There being no direct prohibition in Hindu Law as regards a marriage between a father-in-law and widowed daughter-in-law at least so far as Sudras are concerned, there is therefore no initial presumption against the

Punjab Customs Act—(Contd.)

validity of such marriage. On the contrary when a marriage has taken place in fact, there is in law a presumption in favour of legitimacy. The presumption is stronger when it appears that the marriage took place long ago and was accepted as valid by the brotherhood. The same presumption is raised even in cases of long co-habitation as man and wife amongst Jats. The daughter-in-law comes from a different got and from the stand point of got pure and simple there would be no objection to her marriage with her father-in-law. So far as affinity is concerned. Jats of Garhsankar tahsil consider that a man has a claim to marry not only his brother's widow but also widows of other near relations and this he can do even without a marriage ceremony. (*Bhida J.*)

JAGINDER SINGH vs. KARTARA.

A.I.R. 1936 Lah. 551.

Partition—Appropriation of a part of joint lands by some of the proprietors—Liability to ejectment.

Where some of the proprietors in a village take possession of a part of the *shamilat deh*, no question of adverse possession arises and they cannot be ejected until partition and even then only if they are found to be in possession of a larger share than what they are entitled to. (*Jailal J.*)

TUHIRAM & ANR. vs. RAM MEH.

38 P.L.R. 200.

Religious institution—Rule of succession of Mohants among Dashnami Sannyasis.

Among the Dashnami Sannyasis, it is from amongst the Sadhak chelas of a mohant that his successor is as a rule appointed, (*Tekchand & Dalip Singh JJ.*)

DIGAMBAR DATT GIR vs. BHAIKON GIR.

38 P.L.R. 29 = A.I.R. 1936 Lah. 225 = 165 I.C. 250.

Reversioner—Rights of Reversionary heirs,

Punjab Customs Act—(Contd.)

The right of the reversionary heir under custom is a right in property, the enjoyment of which is deferred and and it is a vested interest though only in the sense that the person in whom it inheres has a present fixed right to its future enjoyment. (*Addison A. C. J., & Din Mohammad, J.*)

NARAIN SINGH vs. MALLIK AHMED YAR KHAN.

A.I.R. 1936 Lah. 21=17 Lah. 133=162 I.C. 374=38 P.L.R. 472.

Reversioner—Ineffective alienation of prospective reversionary right by father, if can be enforced against son when father never inherited the property.

A reversioner derives his right to succeed to ancestral property from the common ancestor and not from his father, and an effective alienation of prospective reversionary rights made by the father cannot be specifically enforced against the son, when the father never inherited the property (*Bhide & Currie JJ.*)

SHER MOHAMMED KHAN vs. CHUHR SHAH.

A.I.R. 1936 Lah. 753.

Succession—Ancestral property.—Meaning of.

Land ceases to be ancestral if it comes into the hands of the owner otherwise, than by descent or by reason merely of his connection with the common ancestor. Therefore the property which comes into the hands of a person by way of a gift from a collateral in excess of what he would have got in case of succession to the donor, is his self-acquired property. 9 Lah. 95 followed. (*Addison & Din Mohammed JJ.*)

BALDEV SINGH vs. PAL SINGH.

38 P.L.R. 313.

Succession—Marri Khattris of Kasur Tashil Lahore District—Law applicable in matters of succession.

In the matter of succession to the property left by a sonless proprietor mairi

Punjab Customs Act—(Contd.)

khattris of Kasur Tahsil, District Lahore are governed by custom and not by Hindu Law. (*Bhide & Currie JJ.*)

SOHAN SINGH vs. MST. NARAINI.

A.I.R. 1936 Lah. 540.

Succession—Sayads of Kotla Sayyadan District Shahpur—rule of succession applicable.

Among Sayads of Village Kotla Sayyadan, District Shahpur, the customary rule of succession is *pagwand* and not *chundawand*. In the said community, therefore, relatives of the whole blood are not entitled to succeed in preference to relatives of the half blood. (*Addison & Din Mohammed JJ.*)

BAHADUR SHAH vs. TULFIQUAR SHAH.

17 Lah. 90=162 I.C. 131=38 P.L.R. 480 (2) A.I.R. 1936 Lah. 767.

Succession—Randhawa Jats of Village Khunda district Gurdaspur—Right of adopt ed son to succeed to collaterals.

An adopted son of a childless Randhawa Jat of village Khunda in the tahsil and district Gurdaspur can when he has been formally adopted succeed collaterals in the adoptive family. 3 Lah. 17 referred to. (*Bhide & Currie JJ.*)

LACHHMAN DAS vs. AMRIK SINGH.

A.I.R. 1936 Lah. 178=161 I.C. 768.

Succession—Person entitled to succeed on adopted son dying without lineal descendants.

On the death of a person who had been appointed an heir under the Customary Law, without lineal descendants any ancestral property of his adoptive father inherited by him would revert to the heirs of the adoptive father. (*Jai Lal J.*)

MEUR. DAS vs. MUNSHI.

38 P.L.R. 838=163 I.C. 895=A.I.R. 1936 Lah. 920.

Punjab Customs Act—(Contd.)**Succession—Property inherited from Guru—right of succession.**

On the death of a Udasi Fakir, the property which he had inherited from his Guru, will, in the absence of a custom to the contrary, devolve on his personal heirs, and not on the heirs of his Guru. (*Jai Lal J.*)

MEHR DAS vs. MUNSHI RAM.

38 P.L.R. 838=161 I.C. 844=A.I.R. 1936 Lah. 151.

Succession—Tiwanas—Interest taken by widow.

Amongst Tiwanas, who do not follow Mahomedan Law but custom, widows only succeed for their lives and other females take under special conditions. They do not take an absolute interest but differ the enjoyment of the estate by a reversioner. (*Addison A. C. J. & Din Mohammad J.*)

NARAIN SINGH vs. MALLIK AHMED YAR KHAN.

A.I.R. 1936 Lah. 183=162 I.C. 374=38 P.L.R. 472.

Succession—Daughter of an Aryan if succeeds to self acquired property of her father in the Chunilal Tahsil of the Lahore District in preference to nephews.

A daughter of an Aryan succeeds to the self-acquired property of her father after the death of her mother to the Chunilal Tahsil of the Lahore District in preference to the nephews and grand nephews of the last male-holder. (*Addison J.*)

BALANDA vs. MST. SUBAN.

17 Lah. 232=38 P.L.R. 592=A.I.R. 1936 Lah. 418.

Succession—Ranjhas of Bhawal Tahsil, Shahpur district—Married daughters if succeed to the self-acquired property of their father in preference to collaterals of the third degree.

There is no custom among the Ranjhas of Tahsil Bhalwal, district Shahpur entitling married daughters to succeed to the self-

Punjab Customs Act—(Contd.)

acquired property of their father to the exclusion of his collaterals in the third degree. (*Addison & Abdul Rashid JJ.*)

MT. BEGUM BIBI vs. RAJA.

17 Lah. 477=A.I.R. 1936 Lah. 205=161 I.C. 647 (2)=38 P.L.R. 966.

Succession—Sayads of kotta sayyadan, District Shahpur—prevailing rule of succession.

The rule of succession prevailing amongst Sayyads of village kotta Sayyadan, District Shapur, is *pagwand* and not *Okunda-wand*. (*Addison & Din Mohammad JJ.*)

BAHADUR SHAH vs. ZULFIKAR SHAH.

38 P.L.R. 480(2)=162 I.C. 131=A.I.R. 1936 Lah. 767.

Succession—Chattra Jats of Village Kot Panah, Tahsil Hafizabad, District Gujranwala—ancestral and non-ancestral property—preferential rights of succession of daughters and collaterals.

Among the Musulman Chattra Jats of Village Kot Panah, Tahsil Hafizabad, District Gujranwala, the collaterals of the last maleholder are entitled to succeed to his ancestral property in preference to his married daughter. But so far as non-ancestral property is concerned, the daughter has a preferential right of succession to the collaterals. (*Tek Chand & Skemp JJ.*)

DAS-AUNDHI KHAN vs. RABIAN BIBI.

17 Lah. 218=38 P.L.R. 447.

Succession—Dillu Jats of Sialkot District—rights of succession of married daughters.

Among Dillu Jats of Sialkot District, a married daughter is not entitled to succeed to her father in the presence of collaterals. (*Addison & Abdul Raschid JJ.*)

GULAB & ORS. vs. UMAR BIBI & ORS.

38 P.L.R. 887=164 I.C. 796=A.I.R. 1936 Lah. 403.

Punjab Customs Act—(Contd.)

Succession—*Jats in Lyalpur District emigrating from Jullunder District right of daughter to succeed to self acquired property of hi. father in preference to collaterals.*

Among Jats who have emigrated to the Lyalpur District from the Jullunder District, when a male proprietor dies without male lineal descendants, his daughter succeeds to his self-acquired properties in preference to a collateral. (*Bhide & Currie JJ.*)

MST. HARBANS KAUR vs. NAGINA SINGH.

A.I.R. 1936 Lah. 273.

Widow—*Alienation to pay husband's debt—what vendee must prove.*

A widow is not competent to alienate the property of her husband even to discharge antecedent debts if there is sufficient income from the property for the purpose. The onus is on the vendee to show that the income was not sufficient for the purpose. (*Bhide J.*)

JAHAN KHAN vs. JAHAN KHAN.

38 P.L.R. 40 = 163 I.C. 824.

Succession—*Jats of Hissar district—Right of daughters to succeed to self acquired property.*

Among the Jats of Hissar district, daughters are preferred as heirs to collaterals in respect of self-acquired property. (*Jailal J.*)

JAIRAM & ORS. vs. LOKERAM.

39 P.L.R. 120 = 161 I.C. 725 = A.I.R. 1936 Lah. 206

Succession—*Randhawa Jats of Amritsar district—Daughters, if exclude collaterals.*

Among Randhawa Jats of Amritsar district, daughters succeed to the non-ancestral property of their father in preference to his collaterals beyond the fifth degree. 37. P. L. R. 225 & 35 P. L. R. 229 relied on; 3 Lah. 257 dissented from; 9 Lah 352 followed. (*Jailal & Sale JJ.*)

JAWA SINGH & ORS. vs. THAKUR SINGH.

A.I.R. 1936 Lah. 85 = 163 I.C. 934.

Punjab Customs Act—(Contd.)

Succession—*Amritsar District collaterals if can succeed in preference to daughters.*

In Amritsar district in the Punjab collaterals are not entitled to succeed to the self-acquired property of the deceased in preference to his daughters. 37 P. L. R. 229 relied on. (*Bhide & Currie JJ.*)

JAWALA SINGH vs. MT. SANTI

A.I.R. 1936 Lah. 802.

Succession—*Aulak Jats of Amritsar district—Daughters, if can succeed to self acquired property of their father in the presence of collaterals.*

Among the Aulak Jats of Amritsar district collaterals exclude daughters from succession to self-acquired land of their father. (*Addison & Abdul Rashid JJ.*)

KARTAR SINGH vs. MT. PREETO.

38 P.L.R. 300 = 17 Lah. 296 = A.I.R. 1936 Lah 8.4.

Succession—*Randhawa Jats of Village Kharika Bangar, Tahsil Batala, District Gurdaspur—right of daughters to succeed in preference to collaterals.*

Among Randhawa Jats of Village Kharika Bangar, in the Batala Tahsil, of the Gurdaspur District, daughters succeed to the non-ancestral property of their father in preference to collaterals of the fifth degree. (*Addison A. C. J. & Din Mohammed J.*)

KESAR SINGH vs. ACHAR SINGH.

17 Lah. 101 = 161 I.C. 692 = 38 P.L.R. 502 = A.I.R. 1936 Lah. 68.

Succession—*Kahlon Jats of Sialkot District—Daughters if entitled to succeed to the self-acquired property of her father in preference to collaterals.*

Among the Kahlon Jats of Sialkot District a daughter is entitled to succeed to the self acquired property of her father in preference to collaterals. (*Tek Chand & Skemp JJ.*)

MAHI vs. MST. BARKATE.

38 P.L.R. 509.

Punjab Custom —(Contd.)**Succession**—*Rights of reversionary heirs.*

The right of the reversionary heir under custom is a right in property, the enjoyment of which is deferred, and it is vested in interest though only in the sense that the person in whom it inheres has a present fixed right to its future enjoyment. The reversioner does not inherit from the last owner but from the common ancestor from whom his interest is derived. The idea of a reversioner succeeding to ancestral property as the legal representative of the deceased person is ordinarily foreign to the foundation on which all custom in the Punjab rests; he succeeds by virtue of his connection through the common ancestor. (*Addison & Din Mohammed JJ.*)

NARAIN SINGH vs. AHMED YAR KHAN

38 P.L.R. 472 = 17 Lah. 133 = 162 I.C.

374 = A.I.R. 1936 Lah. 21.

Succession *Jats in Phillaur Tahsil—district Jullundur Right of collaterals to succeed in preference to daughters.*

In the Phillaur Tahsil in the Jullundur district among Jats, daughters are excluded by collaterals up to and including the fifth degree in matters of succession and there is no distinction between ancestral and non-ancestral property. (*Bhide & Currie JJ.*)

SAJJAN SINGH vs. MT. DHANTI.

A.I.R. 1936 Lah. 130.

Succession—*Sainis of Village Gelar, Tahsil Jullundur—right of daughters to succeed to the non-ancestral property of their father.*

Among Sainis of Village Gelar, Tahsil, Jullundur, a daughter is entitled, in the absence of a son to succeed to the non-ancestral property of her father in preference to collaterals of the 5th degree. (*Tek Chand & Skemp JJ.*)

MST. SHANTI vs. DHARAN SINGH.

17 Lah. 201 = 38 P.L.R. 456.

Punjab Custom —(Contd.)

Succession—*Randhawa Jats of Gurdaspur—Right of daughters to succeed in the presence of collaterals.*

Among the Randhawa Jats of the Gurdaspur district, daughters are generally excluded by collaterals within four degrees from succeeding to the ancestral or self-acquired property of their father. But they are entitled to succeed in preference to collaterals of their father belonging to the 5th degree. (*Addison A.C.J. & Din Mohammad J.*)

SUBEDAR KESAK SINGH vs. ACCHAR SINGH.

A.I.R. 1936 Lah. 68.

Succession—*Nekokra qureshis of Jhang District—succession to sister of property inherited from brother and in self-acquired property.*

Among Nekokra Qureshis of Jhang district, when inheritance devolves, on sisters, sister's sons would succeed to their mothers shares, in the absence of their mothers, but the husband of a sister is not entitled to succeed. The husband has a right to succeed only in the case of self-acquired property of the sisters. (*Addison & Rashid JJ.*)

UMAR HAYAT vs. NAZAR MAHAMMAD.

38 P.L.R. 1077 = 162 I.R. 339 (1) = A.I.R. 1936 Lah. 373.

Succession—*Arains of Amritsar District—right of daughter to succeed to self-acquired property of her father.*

Among Arains of the Amritsar District, a daughter is entitled to succeed to the self-acquired property of her father in preference to collaterals of the third degree. (*Tek Chand & Skemp JJ.*)

MST. ZAINAB BIBI & ANR. vs. JAMAL DIN & ANR.

38 P.L.R. 874.

Succession—*Sister and her son, if heirs in Kangra district.*

Punjab Customs—(Contd.)

Under the customary law prevailing in the Kangra district, the sister and her son of a deceased proprietor are not his heirs and are not entitled to succeed to his estate. (*Jai Lal J.*)

MT. BUNDO vs. MT. NIHALO.

38 P.L.R. 251 = A.I.R. 1936 Lah. 660 = 165 I.C. 78.

Succession—Gaur Brahmins of Chiragh Delhi—Remoter kindred, if excluded from succession by nearer kindred,

Amongst the Gaur Brahmins of Chiragh Delhi, the nearer kindred of the last male holder do not exclude the remoter kindred. The more remote are entitled to succeed simultaneously with the nearer descendants. (*Addison & Abdul Raschid JJ.*)

MISRI LAL vs. BABU LAL.

A.I.R. 1936 Lah. 679 = 161 I.C. 844.

Widow—Nagrial Jats of Tahsil Rharain, District Gujrat—validity of gift by widow of her husband's estate to one of his collaterals.

Among the Nagrial Jats of Kharian, Dist. Gujrat, there is a custom which allows a widow to make a gift of her husband's estate in favour of one of his collaterals in lieu of services. (*Tek chand & Skemp JJ.*)

KHUSIA & ORS. vs. HAJI.

17 , 13 = 38 P.L.R. 450

Will—Sayyeds of Shahpur district—Bequest in favour of daughter's sons, if valid.

Among the miscellaneous Mussulman tribes including the Sayyeds of Shahpur district, there is no general custom which entitles a person to bequeath his property by will in favour of his daughter's sons. (*Bhide & Currie JJ.*)

AMIR HUSAIN SHAH & ANR. vs. GHULAM BAQUIR SHAH & ORS.

A.I.R. 1936 Lah. 210 = I.C. 113 = 38 P.L.R. 731.

PUNJAB LAND REVENUE ACT (XVII OF 1887)

Sec. 44—Mutation proceedings, if require to be proved by production of Revenue Officer who sanctioned them.

Where in hearing an appeal, the District Judge refuses to consider the effect of the mutation proceedings in deciding a certain point on the ground that those proceedings had not been duly proved by producing the Revenue Officer who sanctioned the mutation proceedings as a witness, *held*, that it was not necessary to call the Revenue officer for proving the mutation proceedings. **38 P. L. R. 225 affirmed.** (*Addison & Abdul Rashid JJ.*)

RODHIAL vs. MST. ATRI.

38 P.L.R. 471.

Sec. 44—Mutation proceedings, if must be proved by production of Revenue Officer who sanctioned them.

Where the lower Court refuses to consider the effect of mutation proceedings in deciding certain points on the ground that the proceedings had not been duly proved by producing the Revenue Officer who sanctioned them as a witness, *held*, that the mutation proceedings should have been taken into consideration. (*Bhide J.*)

MT. ATRI vs. RODHIAL.

38 P.L.R. 225 = A.I. 1936 Lah. 864.

Sec. 44—Conflict between record of current and previous settlements—presumption of truth.

The presumption of correctness of record of rights applies only to record of current settlement, where those differ from those of previous settlements. (*Coldstream & Jailal JJ.*)

MOHAMMAD SHARIF vs. TEJA SINGH.

38 P.L.R. 1086 = A.I.R. 1936 Lah. 453.

Sec. 45—Right of person aggrieved by entry in the Record of Rights, to seek relief,

Punjab Land Revenue Act—(Contd.)

Sec. 45 Punjab Land Revenue Act clearly empowers any person aggrieved by an entry in the Record of Rights, to seek relief under Sec. 42 Specific Relief Act. It is for the plaintiff to decide whether they feel aggrieved by any such entry, and if the plaintiffs assert that they are so aggrieved the defendant cannot be allowed to urge that the plaintiff should not feel aggrieved and be not permitted to approach the Court. (*Addison & Din Mohammed, JJ.*)

GHULAM MOHAMMAD KHAN vs. SAMUNDAR KHAN.

38 P.L.R. 748 = A.I.R. 1936 Lah. 37 = 165 I.C. 626.

PUNJAB LAWS ACT (IV OF 1872).

Sec. 5—*Onus of proving that a person is governed by custom.*

There is no such thing as general customary law and under Sec. 5 of the Punjab Laws Act, a party who relies on custom must prove in the first instance that custom furnishes the rule of decision, and secondly, what that custom is. 45 Cal. 450 followed. (*Addison & Abdul Raschid JJ.*)

KARTAR SINGH vs. MT. PREETO.

17 Lah. 296 = 38 P.L.R. 300 = A.I.R. 1936 Lah. 804.

PUNJAB LIMITATION (CUSTOM) ACT (I OF 1920.)

Art. (2)—*Scope of the article,*

Art. 2 (b), Punjab Limitation Act, 1920, which provides a period of 3 years, applies to a suit for possession of ancestral immovable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom in cases where a declaratory decree has been obtained during the lifetime of the alienor. But a suit for declaration that the plaintiffs who had previously obtained a decree for a declaration in the lifetime of the alienor, that the alienation was not binding on them after the alienor's deaths, that they had deposited the amount found in previous suit for necessity, in Court, and that they had obtained possession of the land out of Court

Punjab Limitation Act—(Contd.)

and that they should be declared owner of the land, is governed for the purpose of limitation by Art. 120 of the Limitation Act. (*Jailal JJ.*)

ISSUR DAS vs. GHULAM MOHAMMAD.

38 P.L.R. 537 = 165 I.C. 149 = A.I.R. 1936 Lah. 835.

PUNJAB MUNICIPAL ACT (III AOF 1911.)

Sec. 173 (1)(a)—*Contract entered into by Executive Officer for the use of wall for affixing posters thereto, if binding on Municipal Committee.*

A contract for the use of a wall for the purpose of affixing posters thereto is one which affects immovable property, and therefore requires the sanction of the Municipal Committee in writing, sealed with the common seal of the Committee. In the absence of sanction, the contract will not be binding upon the Committee. (*Beckett J.*)

MUNICIPAL COMMITTEE, AMRITSAR vs. NANAK CHAND.

38 P.L.R. 741 = A.I.R. 1936 Lah. 177 = 159 I.C. 775.

Sec. 47—*Contract with municipality not reduced to writing—municipality, if can sue to recover money under the contract.*

When a contract has been entered into between a person and the municipality and such person has enjoyed the benefit of the contract, it is not open to him to resist liability for the payment of money to the municipality, on the ground that, the contract had been reduced into writing and as such did not conform to the imperative provisions of Sec. 47 of the Punjab Municipal Act, 11 Lah. 121 followed. (*Addison & Abdul Raschid JJ.*)

DULA SINGH vs. MUNICIPAL COMMITTEE, SARGODHA.

38 P.L.R. 41.

Sec. 49—*Suit if may be defeated for want of notice, when notice, not required at time of filing is rendered necessary by subsequent amendment.*

Punjab Municipal Act—(Contd.)

The plaintiff's suit when instituted was incompetent for want of notice. An amendment in the plaint having been made on account of circumstances which arose by the order of the Court passed at the instance of the defendant, the suit cannot be defeated on the ground of an objection based on want of notice. (*Jai Lal J.*)

MAHAMMAD DIN vs. MUNICIPAL COMMITTEE SIALKOT

38 P.L.R. 1069=164 I.C. 425=A.I.R. 1936 Lah. 1008.

Sec. 172—*Right to remove encroachments erected without permission, if subject to any limitation.*

Sec. 172, Punjab Municipal Act, gives a statutory right to a Municipal Committee in the Punjab to remove any encroachment erected without permission, and there is no limitation in point of time, except that compensation must be paid, if the structure is more than three years old. (*Beckett J.*)

MUNICIPAL COMMITTEE, AMRITSAR vs. MSST. GUJRI.

38 P.L.R. 744=A.I.R. 1936 Lah. 182=159 I.C. 639.

Sec. 225—*Civil Courts if can interfere with an order of the Municipal Committee, which is ultra vires.*

Sec. 225 of the Punjab Municipal Act does not oust the jurisdiction of the civil court to interfere with an order of the Municipal Committee which is found by it to be ultra vires, arbitrary, oppressive or capricious. (*Jailal J.*)

MUNICIPAL COMMITTEE, SIALKOT vs. JAGAT SINGH.

38 P.L.R. 83=160 I.C. 942=A.I.R. 1936 Lah. 572.

Sec. 232—*Resolution of Municipal Committee granting sanction suspended by Deputy Commissioner—suspension order, if can affect validity of sanction already acted upon.*

Punjab Municipal Act—(Contd.)

When sanction to erect a structure has been granted by the Municipal Committee by a resolution and has been acted upon, an order by the Deputy Commissioner acting under Sec. 232, Punjab Municipal Act suspending the resolution granting sanction, cannot affect the validity of the sanction granted by the Committee and acted upon. (*Coldstream J.*)

MOHAMMED HUSSAIN vs. MUNICIPAL COMMITTEE, SIALKOT.

38 P.L.R. 897=A.I.R. 1936 Lah. 689=165 I.C. 856.

PUNJAB PREEMPTION ACT (I OF 1913.)

Sec. 8—*Notification excepting land in Municipal limits from right of pre-emption—Land brought within such limits after notification, if covered.*

Where the local Government under Sec. 8, Punjab Pre-emption Act declared by notification that in a certain area within the limits of a Municipality the provisions of the Punjab Pre-emption Act would not operate and subsequently certain other lands were brought within the Municipal limits, held that the notification issued by the Government was wide enough to cover the area which were subsequently included within the limits of the Municipality after the date of the notification. (*Jailal J.*)

HIRALAL vs. MST. JIWAN.

17 Lah. 426=38 P.L.R. 876=A.I.R. 1936 Lah. 1415=161 I.C. 660.

Sec. 11—*Application by decreeholder for attachment of house purchased by Judgment debtor—pre-emption suit decreed—pre-emptor debtor depositing money in court such deposit if exempt from attachment.*

The decree-holders in execution of their decree against the Judgment-debtor applied for attachment of a house purchased by him. Before the attachment could be effected a suit for pre-emption had been filed. The suit was decreed and the pre-emptor deposited a certain amount in the Court which had not been drawn by the Judgment

Punjab Pre-emption Act—(Contd.)

debtor, the decree-holder applied for attachment. (*Jai Lal J.*)

ISHAR SINGH vs. ALLAH RAKHA.

38 P.L.R. 906=165 I.C. 658=A.I.R. 1936 Lah. 698.

Sec. 15—"Owner of the estate"—Significance of the expression.

The term "owner of the estate" as used in Sec. 15. Punjab Pre-emption Act imports ownership of agricultural land only and as soon as an area of land which was admittedly agricultural before is converted into a building site, it at once ceases to be a part of the estate and its owner therefore is deprived of all those privileges which he could otherwise enjoy under the law. (*Addison A. C. J. & Din Mohammad J.*)

SHAH MOHAMMAD vs. MT. PAIRI.

17 Lah. 322=38 P.L.R. 664=A.I.R. 1936 Lah. 292.

Sec. 15(b)—Right of cognates of vendor to pre-empt.

A person who is a cognate of the vendor is entitled to pre-empt a sale of property in favour of any stranger. The use of the expression "in order of succession", in cl. (b) of Sec. 15. Punjab Pre-emption Act, clearly indicates that every person who would be entitled to succeed under the law is entitled to maintain a suit for pre-emption, but if a preferential heir chooses to exercise the right then the right of the remoter heir is defeated.

GHULAM ALI vs. KUTABDIN.

38 P.L.R. 774=A.I.R. 1936 Lah. 477=163 I.C. 513.

Sec. 16—Owner of Urban immovable property, if entitled to pre-empt the sale of agricultural land.

A person who is the owner of an Urban immovable property is not entitled to pre-empt the sale of agricultural land within

Punjab Pre-emption Act—(Contd.)

the limits of the urban area. (*Addison A. C. J. & Din Mohammad J.*)

SHAH MOHAMMAD vs. MT. PAIRI.

17 Lah. 322=38 P.L.R. 664=A.I.R. 1936 Lah. 292.

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934)

Sec. 6 —Part III of the Act, if applicable to suits and appeals pending or filed before the passing of the Act.

According to Sec. 6, Punjab Relief of Indebtedness Act, the provisions of Part III of the Act apply only to suits which were pending or instituted after the commencement of the Act. They do not apply to a suit decided before the coming into force of the Act, even though an appeal is pending from such suit on that date. The legislature presumably used the word 'suit' advisedly in Sec. 6, so as to exclude appeals from the scope of the section. (*Bhide J.*)

MOHAMMED vs. CHUNI LAL.

38 P.L.R. 885=A.I.R. 1936 Lah. 678=165 I.C. 657

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925)

Sec.—2 (a)—*Udasiss, if may be presumed to be Sikhs.*

For the purposes of the Punjab Sikh Gurdwaras Act. *Udasiss* may not be presumed to be Sikhs, and the change in the definition of the term "Sikh" by the Amending Act III of 1930 has made no difference in this respect. (*Coldstream & Bhide JJ.*)

MUKAND SINGH vs. PURAN DAS.

38 P.L.R. 831=163 I.C. 727=A.I.R. 1936 Lah. 924.

Sec.—5—*Petition under the section—duty of the tribunal*

In a petition under Sec. 5. Punjab Sikh Gurdwaras Act, what the Tribunal has primarily to decide, is the right, title or interest of the petitioner in the property in dispute. It may have to determine the objections raised by the opposite party for that purpose, but the section does not seem

Punjab Sikh Gurdwaras Act—(Contd.)

to justify the determination of the objector's rights only, without any pronouncement on the rights of the petitioner. (*Coldstream Bhide JJ*)

COMMITTEE OF MANAGEMENT OF GURDWARAS, AMRITSAR *vs.* ATMA SINGH.

38 P.L.R. 865 = A.I.R. 1936 Lah. 643 = 165 I.C. 667.

Secs. 7 (1) & 8—*Person describing property as private one and not claiming to be hereditary office-holder if entitled to fall under Sec. 8.*

A person claiming a property as his private property and investing it with a sectarian character, can under no circumstances be described as an office-holder attached thereto, much less a hereditary office-holder. If a person wishes to claim the benefit of Sec. 8 of the Punjab Sikh Gurdwara Act, he must expressly assert that the place is a Gurdwara, and that he holds an hereditary office attached to it. (*Addison A. C. J. & Din Mohammed JJ.*)

BASANT SINGH *vs.* KARTAR SINGH.

A.I.R. 1936 Lah. 213 = 162 I.C. 847.

Sec. 8—*Hereditary office-holder, meaning of.*

A hereditary office for the purpose of Sec. 8 of the Punjab Sikh Gurdwaras Act means an office, the succession to which before 1st January, 1920, devolved according to hereditary right, or by nomination by the office-holder for the time being. (*Coldstream & Bhide JJ.*)

ALBEL SINGH *vs.* NARAIN DAS.

38 P.L.R. 870 = A.I.R. 1936 Lah. 675

Sec. 8—*Right to present petition under the section.*

It is open to any hereditary office-holder to present a petition under Sec. 8, Punjab Sikh Gurdwaras Act. It is not necessary that he should be either a past office-holder or a present office holder. (*Coldstream & Bhide JJ.*)

ALBEL SINGH *vs.* NARAIN DAS.

38 P.L.R. 870 = A.I.R. 1936 Lah. 675.

Punjab Sikh Gurdwaras Act—(Contd.)

Sec. 8—*Nirmalas if belongs to Sikh priesthood.*

The Nirmala Panch was started by Gurm Govind Singh. The Nirmalas are not a body like the Udasis who broke off from Sikhism before it had reached its final stage. The Nirmalas who were originally theologians by reason of their training had certain leanings towards some of the sacred Hindu books but they are the first and foremost Sikh priests. (*Addison & Abdul Rashid, JJ.*)

BISAKHA SINGH *vs.* SOCHA SINGH.

38 P.L.R. 761 = 163 I.C. 524.

Sec. 10—*Petition stating that non-applicant has no right—non-applicant not putting any claim—Tribunal, if can determine non-applicant's right.*

The power to deal with a petition under Sec. 10, Punjab Sikh Gurdwaras Act, does not include authority to determine a claim not included in the petition itself. Therefore where the petitioners stated that certain persons had no right of superintendence and control, the claim being based on the plea that the petitioners were owners of the *Bunga* and the evidence adduced by them was to prove that the *Bunga* was not waki property, held, that on the failure to prove the claim, all that the Tribunal could do was to dismiss the petition, and it had no right to adjudicate upon the question as to what right were possessed by the non-applicants. (*Coldstream & Bhide JJ.*)

KESAR SINGH *vs.* BALWANT SINGH.

38 P.L.R. 861 = A.I.R. 1936 Lah. 645.

Sec. 16(2)—*Issues under—Onus of proving the affirmative in respect of the issues under Sec. 16(2) on whom lies.*

The onus of proving the affirmative in respect of issues raised under the sub-clauses of sub-sec. 2 of sec. 16 of the Sikh Gurdwaras Act is on persons who claim a Gurdwara to be a Sikh Gurdwara contemplated by the Act. (*Sir George Rankin.*)

HEM SINGH *vs.* MOHUNT BESANT DAS & ANR.

63 I.A. 180 = 17 Lah. 146 = 40 C.W.N. 610 = 38 Bom. L.R. 479 = 38 P.L.R. 378 1936 M.W.N. 341 = 63 C.L.J. 391 = 161 I.C. 529 = A.I.R. 1936 P.C. 93.

Punjab Sikh Gurdwaras Act—(Contd.)

Sec. 16(2) (iii)—*Dharamsala private property at foundation—subsequent rebuilding by Sikh and Sikh worship thereafter, if can make it a Sikh Gurdwara.*

A dharamsala, at the time of its foundation was not a public institution, but was the private property of the Udasi fraternity. Years later, it was rebuilt by the Sikhs, but was continued to be managed by the hereditary mahants. Subsequent to the re-building, the worship at the institution was Sikh worship *Held*, that this fact alone did not make the dharamsala a Sikh Gurdwara within the meaning of Sec. 16 (2) (ii) of the Punjab Sikh Gurdwaras Act. (*Coldstream & Bhide JJ.*)

ALBEL SINGH vs. NARAIN DAS.

38 P.L.R. 870 = A.I.R. 1936 Lah. 675

Sec. 16 (2) (iii)—*Proof required for establishing that a Dharamsala is a Sikh Gurdwara.*

In order to succeed in proving that a Dharamsala is a Sikh Gurdwara under the provisions of Sec. 16(2) (iii) of the Punjab Sikh Gurdwara Act, it is necessary to prove not only that the Dharamsala was being used for public worship by Sikhs before and at the time of the presentation of the application under the section, but also that it was established for this purpose. (*Coldstream & Bhide JJ.*)

MUKAND SINGH vs. PURAN DAS.

38 P.L.R. 831 = 168 I.C. 727 = A.I.R. 1936 Lah. 924.

Sec. 16 (2) (iii)—*Necessary ingredients for constituting an institution a Sikh Gurdwara, as contemplated by the Act.*

Where there is no reliable evidence to show that the institution in dispute had been established for public worship by the Sikhs, and it appears that the grants made to the institution were by way of charity and contained no reference to any public worship, it cannot be held to be established that the institution was founded for public worship by the Sikhs. The mere fact that the institution was given grants of lands by

Punjab Sikh Gurdwaras Act—(Contd.)

a Sikh Sardar and a Sikh prince, and that it was named after Bawa ; Nikha Singh who was apparently a Nirmal Sadh, cannot be held to be sufficient to establish that the institution was founded for public worship by the Sikhs. The grants may very well have been made only for charitable purposes. Such an institution therefore cannot be declared as a Sikh Gurdwara. (*Bhide & Currie, JJ.*)

SANTA SINGH vs. PURAN DAS.

A.I.R. 1936 Lah. 219 = 162 I.C. 858

Sec. 16 (2) (iii)—*Establishment of Gurdwara for use by Sikhs for public worship, if must be proved by adequate evidence even when institution old.*

Even if a Gurdwara be an old one, that it was established for use by Sikhs for the purposes of public worship must be established by suitable and sufficient evidence admissible under the Evidence Act, although the great age of the institution may taken into account in estimating the evidence. (*Sir George Rankin.*)

HEM SINGH vs. MOHUNT BASANT DAS.

63 I.A. 80 = 17 Lah. 146 = 40 C.W.N. 610 = 38 Bom. P.L.R. 479 = 38 P.L.R. 378 = 1936 M.W.N. 341 = 63 C.J.J. 390 = 161 I.C. 529 = A.I.R. 1936 P.C. 93.

Sec. 34—*Decree of the High Court under the Act—Appeal to Privy Council.*

The jurisdiction exercised by the Tribunal constituted under the Sikh Gurdwaras Act and the jurisdiction on appeal given to the High Court are not special jurisdictions so as to exclude the application of the principle that when a dispute is referred to an established Court without any limitations, the ordinary instances of procedure in that Court including any general right of appeal from its decisions, attach thereto. Therefore the provisions of the C. P. Code can with reference to the appeals to the Privy Council apply to decrees of the High Court under Sec. 34 of the Sikh

Punjab Sikh Gurdwaras Act—(Contd.)

Gurdwaras Act. 40 C. W. N. 21 distinguished. (*Sir George Rankin.*)

HEM SINGH vs. MOHUNT BASANT DAS,
63 I.A. 180=17 Lah. 846=40 C.W.N.
610=63 C.L.J. 390=38 Bom. L.R. 479
=1936 M.W.N. 341=44 M.L.W. 443=
38 P.L.R. 378=161 I.C. 529=A.I.R.
1936 P.C. 93.

PUNJAB TENANCY ACT (XVI OF 1887)

Secs. 50 & 70 (3) (g) -Occupancy right on tenant becoming insolvent—Landlord recovering possession of the land from vendee—Suit by tenant for recovery of possession from landlord—Suit, if cognisable by Civil Court.

The occupancy rights of certain tenants on their becoming insolvents were on their application sold and purchased by a third party. The landlord thereupon sued in the Revenue Court for cancellation of the sale and recovery of possession. After the landlord had recovered possession, the ex-occupancy tenants instituted a suit against him for possession of the said lands on the ground that the landlord having come into possession of the lands they were entitled to hold it as occupancy tenants. *Held*, that the suit was cognisable by a Civil Court. (*Addison & Abdul Rashid J.J.*)

ANTU vs. HUHAMMAD IBRAHIM ALI KHAN.

38 P.L.R. 465=A.I.R. 1936 Lah. 657.

Sec. 59 - Continued possession through generation—presumption of right of last person.

Where possession of property has been traced for several generations, the law allows a presumption in favour of the last person that he obtained his right from his father. (*Agha Haidar J.*)

SHER DIN vs. SHAH NAWAZ.

38 P.L.R. 433.

Sec. 59 Occupancy tenant dying without male descendant or widow—Right of succession.

Punjab Tenancy Act—(Contd.)

Under Sec. 59, Punjab Tenancy Act if an occupancy tenant dies without leaving any male lineal descendant or a widow, the tenancy is extinguished unless there are in existence any male collateral relations in the male line of descendants from the common ancestor of the deceased tenant and those relatives and such ancestors had occupied the land. (*Teckchand & Abdul Raschid, J.J.*)

ISMAIL vs. FAZLA.

A.I.R. Lah. 97.

Sec. 60—Suit by landlord for setting aside unauthorised transfer—by tenant—other landlords, if can benefit by the decree obtained in the suit rights of the transferor tenant.

A decree obtained by one of the landlords setting aside under Sec. 60, Punjab Tenancy Act, an alienation by an occupancy tenant enures for the benefit of all the landlords, whose rights cannot be affected by the failure of the decree-holder landlord to execute his decree. The decree also enures for the benefit of the occupancy tenant, who can recover possession of the transferred occupancy holding, but only on refunding the consideration money received by him. If he sues to recover possession of the occupancy holding the transferee can recover the consideration money by application in the suit, without resorting to a separate suit for the purpose. (*Bhide J.*)

SUBA SINGH vs. HADAYAT.

36 P.L.R. 922=A.I.R. 1936 Lah. 706=165 I.C. 640.

Secs. 60, 76 & 77—Validity of sale occupancy right in favour of landlord Suit by landlord for declaration of his rights of under the sale—Jurisdiction of the Civil Court to entertain.

A widow succeeded to the occupancy rights of her husband in certain lands and subsequently sold those rights to the landlord and gave him possession of the land. When the landlord applied to have mutation of those rights made in his favour the Revenue authorities refused to effect the mutation on the ground that

Punjab Tenancy Act—(Contd.)

the sale of the occupancy rights was void under the law. The landlord thereupon instituted a suit for a declaration that he was the owner of the land, i.e., that occupancy rights which vested in the widow had been extinguished by the sale in his favour. *Held*, that the Civil Court had jurisdiction to entertain the suit as relationship of landlord and tenant no longer existed, the widow having sold her rights in the land to the landlord. *Held*, further that the sale of the occupancy rights to the landlord was not void but only voidable at the instance of the landlord. (*Jailal J.*)

MST. MALLAN vs. GORA MALL.

38 P.L.R. 564 = 163 I.C. 838 = A.I.R. 1936 Lah. 922.

Sec. 77—*Suit for possession of occupancy right if cognisable by civil court.*

Sec. 77, Punjab Tenancy Act or any other provision of law does not oust the jurisdiction of the civil court to entertain a suit for possession of occupancy land or of a house in the Abadi. (*Tekchand & Abdul Rashid, J.*)

ISMAIL vs. FAZLA.

A.I.R. 1936 Lah. 97.

Sec. 77—*Suit for declaration that plaintiffs were in possession of land as co-sharers in village and not as tenants, if can be brought in the Civil Court.*

A suit for a declaration that the plaintiffs were in possession of certain lands as co-sharers in the village and not as tenants and therefore not liable to ejectment until partition is not barred under any clause Sec. 77, Punjab Tenancy Act or any other provision of law. Such a suit is clearly cognisable by a Civil Court, and a dismissal of a suit by the Revenue Court contesting a notice of ejectment does not operate as res judicata. 9 Lah. 38 distinguished. (*Tek Chand J.*)

MEHR SINGH vs. SOHAN SINGH.

38 P.L.R. 915 = 165 I.C. 521 = A.I.R. 1936 Lah. 710.

Punjab Tenancy Act—(Contd.)

Sec. 77—*Suit relating to a land used not for agriculture, but for building, if cognisable by Civil Court.*

Where the land in dispute is neither occupied nor has it been let for agriculture, but is occupied as the site of a building in a village, the provisions of the Punjab Tenancy Act are not applicable and a suit in respect of the land is not excluded from the jurisdiction of the Civil Courts by Sec. 77, Punjab Tenancy Act. (*Jai Lal J.*)

AMAR SINGH vs. SUNDAR,

38 P.L.R. 554 = A.I.R. 1936 Lah. 662
164 I.C. 749.

RAILWAYS.

Crop of inflammable nature grown close to railway line—loss by fire caused by sparks from engine—owner not maintaining fire line between his crop and Railway, if guilty of contributory negligence.

Dry standing grass on the lands of the Railway Company adjoining the Railway line, caught fire from sparks from the Railway engine, and the fire spread on to the plaintiff's land and burnt his standing Patel grass. The plaintiff thereupon claimed damages against the Railway Company. *Held* that, even if the omission of the Railway Company to cut the grass on the lands adjoining the Railway line amounted to negligence the plaintiff was guilty of contributory negligence in as much as he was well aware that a danger may result from the use of Railway engines in a statutory manner and did not take the ordinary precaution of placing a fire line between his crop and the Railway fencing, and was therefore not entitled to damages. (*Sulaiman C. J. & Bennet J.*)

B. B. & C. I. RY. CO., vs. DWARKA NATH.

1936 A.L.J. 262 = 1936 A.W.R. 301 =
161 I.C. 882 = A.I.R. 1936 All. 771.

RAILWAYS ACT (IX OF 1890)

Secs. 58, 75 & 78—*Declaration as to value—Consignor, if can go behind such declaration.*

Railways Act—(Contd.)

The plaintiff had sent a consignment of *Ganja* by the B. N. Railway and had made a certain declaration as to the value of the total consignment. A part of the consignment having been lost, the plaintiff brought a suit for compensation for an amount exceeding the proportionate value of the loss according to the declared value of the whole consignment but not exceeding the total value so declared. *Held*, that the plaintiff was estopped from proving the real value of the consignment and was entitled to recover only the proportionate value according to his declaration. (*Wort & Rowland JJ.*)

SORABJI DADABHAI vs. B. N. RAILWAY Co.

15 Pat. 394 = A.I.R. 1936 Pat. 393 = 163 I.C. 885 = 17 Pat. L. T. 268.

Sec. 72—Risk Note Form 'B'—Responsibility of Railway Company in despatching perishable goods.

There is nothing in the rules framed under the Indian Railways Act which requires a through wagon of perishable goods to be rushed from the station of despatch to its destination by the first available train. It is only where there are full wagon loads of perishable goods that they are to be attached to the first available train. (*Agarwalla & Saunders, JJ.*)

SECRETARY OF STATE FOR INDIA vs. RAM LAKHAN RAM.

17 P.L.T. 521.

Sec. 72—Risk Note Form 'B'—Consignment of potatoes—Railway Company not aware of another consignment of rotten potatoes along with it—Misconduct, if any.

Where the plaintiff sued for damages for loss suffered by him due to the Railway Company having loaded his consignment of potatoes with another consignment of rotten potatoes, *held*, that in the absence of evidence that the Railway Company were aware of the fact of the other consignment not being in sound condition, the Railway company could not be said to be guilty of misconduct

Railways Act—(Contd.)

so as to make the Company liable for damages. (*Agarwalla & Saunders, JJ.*)

SECRETARY OF STATE FOR INDIA vs. RAM LAKHAN RAM.

17 P.L.T. 521.

Sec. 72—Goods conveyed under risk note damaged by reason of being kept with other offensive goods—liability of the Company.

The plaintiff sued for damages in respect of certain goat skins which he had despatched under a risk note, and which had been damaged by being loaded along with a certain acid known as *formal de hyde*. The railway denied liability on the ground that there had been no negligence on their part, and the jars of *formal de hyde* were not dangerous; combustible or inflammable article requiring them to be carried separately. Further, risk note A, which had been executed by the Sadar expressly stated "liable to dryage and damage. *Held*, that under the circumstances, the Railway Company could not be made liable, as the servants of the company could not be considered to have had knowledge of the likelihood of damage being caused by the goods being carried along with the jars of *formal de hyde*. (*Venkataramana Rao J.*)

ROSHAN UMAR KARIM vs. MADRAS & SOUTHERN MARHATTA RAILWAY, LTD.

59 Mad. 789 = 70 M.L.J. 808 = 1936 M.W.N. 594 = 43 M.L.W. 638 = A.I.R. 1936 Mad. 508 = 163 I.C. 493.

RANGOON (CITY) MUNICIPAL ACT (VI OF 1922).

Sec. 194—Person appointed by Local Government to exercise powers of Revenue Officer, selling tax payer's property for arrears of Municipal tax—mortgagee of the property giving notice to such person claiming the surplus sale proceeds—sale proceeds deposited into Corporation Bank and paid to mortgagor under directions of the Officer

Rangoon Municipal Act—(Contd.)

selling the property—liability of Corporation to the mortgagee.

In exercise of the powers under Sec. 194, Rangoon City Municipal Act, the Local Government appointed the *Akunwan*. Corporation of Rangoon, for the purpose of recovering arrears of taxation from rate payers and authorised the said officer to exercise the powers conferred and the duties imposed upon the Revenue Officer under Secs. 45, 46 and 57 of the Lower Burma Land and Revenue Act. The *Akunwan* having said the properties of a tax payer for arrears of Municipal taxes, the plaintiffs, who were the mortgagees of the property give notice to the *Akunwan* of their rights as mortgagees and claimed the surplus sale proceeds. The sale proceeds however were not paid to the mortgagees, but deposited in the Corporation Bank and later paid to the mortgagor under instructions of the *Akunwan*. The plaintiffs thereupon sued the Corporation for the recovery of the surplus proceeds of the sale.

Held, that the *Akunwan* in performing the functions under the Act was not acting as the servant or agent of the Corporation but as a *persona designata* vested with special powers of a judicial character. His action in the disposal of the sale proceeds could not therefore be controlled or influenced by the Corporation, nor could the Corporation be made liable to third persons for any negligence or dereliction of duty on his part. Moreover the Corporation had no beneficial interest in the surplus sale proceeds, which it held solely as a bailee and was bound to pay them out according to the directions of the Revenue Officer. (*Page C. J. & Mya Bu J.*)

BALTHAZAR & SON, LTD., vs. MUNICIPAL CORPORATION OF THE CITY OF RANGOON & ANR.

14 Rang. 160=160 I.C. 448=A.I.R. 1936 Rang 354.

RECEIVER.

Mortgage suit—criterion for appointing a Receiver.

The mere fact that interest is in arrear does not entitle the plaintiff in a mortgage suit to have a receiver appointed. In order to have a receiver appointed, he must

Receiver—(Contd.)

show that the security originally sufficient is likely to become insufficient either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself. (*Mya Bu & Baguley J.J.*)

S. K. R. M. CHETTYAR vs. V. E. A. CHETTYAR.

14 Rang. 16=160 I.C. 490.

Appointment of—Apprehension that deft. would wrongfully dispose of his property if a ground for appointing a Receiver.

The mere apprehension in the mind of the plaintiff that the defendant would wrongfully dispose of his property is not sufficient to justify the Court in appointing a Receiver without further enquiry as to the basis of the apprehension. (*Hilton, J.*)

HARI KISHAN LAL & SONS vs. PEOPLES BANK OF NORTHERN INDIA LTD.

A.I.R. 1936 Lah 102.

Appointment of—Creditor having right against specific fund or estate—Right to have a Receiver appointed.

There is a distinction between the practice of appointing a Receiver in the case of a general creditor and in the case of a creditor who was a right against a specific fund or estate. The latter class of creditors is entitled to a Receiver on the ground that they have a special or equitable charge or liable upon the debtor's property. (*Hilton J.*)

HARI KISHAN LAL & SONS vs. PEOPLES BANK OF NORTHERN INDIA LTD.

A.I.R. 1936 Lah, 102.

Appointment of receiver by insolvency court—subsequent appointment of receiver in mortgage suit if legal.

After a preliminary decree had been passed in a mortgage suit, the mortgagors were declared insolvent and a receiver was appointed by the Court. Later the mortgagee-decree holder in the mortgage suit also applied for the appointment of a Receiver to

Receiver—(Contd.)

take charge of the mortgaged properties, and a Receiver was appointed by the Court. *Held*, the appointment of a Receiver at the instance of the mortgagee decree-holder was not proper as it had the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of the mortgaged property although the mortgagee had not till then obtained a final decree, 59 Mad. 915 & 47 Cal. 411 considered (*Agarwalla & Rowland JJ.*)

GO-CHURAN SINGH CHOUDHURY vs. RAMBALLABH DAS.

17 P.L.T. 671=163 I.C. 811=A.I.R. 1936 Pat. 357.

Authority to institute suits on behalf of estate—At what stage should be filed.

An authority from the High Court to institute suits on behalf of an estate may be obtained by the Receiver appointed to take charge of the estate at any stage of the suit, the authority being merely for the purpose of proving the bonafides of the Receiver. (*M. C. Ghose J.*)

CHANDRA KUMAR DE vs. K. C. MUKHERJEE.

A.I.R. 1936 Cal 289.

RECORD OF RIGHTS.

Presumption of correctness of entry in record of rights.

A record of right is entitled to presumption of correctness even if it follows a previous record of rights in the matter of boundary lines between two districts, and finding of fact arrived at after ignoring the presumption is not binding in second appeal. (*Dhale & Agarwala JJ.*)

BHUPNARAIN SINGH vs. HIRALAL.

17 P.L.T. 405=161 I.C. 709=A.I.R. 1936 Pat. 185.

Defence based on correctness of entry in Record of Rights—onus to prove correctness on whom lies.

In a suit for eviction of a tenant, where the tenant bases his defence on the Record

Record of Rights—(Contd.)

of Rights, it is not for the defendant to prove the custom or usage which would support the correctness of the Record of Rights, but it is on the plaintiff to disprove the correctness on the entry by 'proving the absence of custom and usage and thereby establishing that the Record of Rights was incorrect. (*Rowland J.*)

RAM GOLAM SINGH vs. CHARAN MAHTON & ORS.

159 I.C. 460=A.I.R. 1936 Pat. 57.

Evidentiary value of record-of rights.

The record-of rights has a presumptive evidentiary value, and under the law the entries in it must be presumed to be correct unless the contrary is proved by evidence. (*Mohammad Noor & Varma, J.*)

NETAI LAL DATTA vs. GOHINDA BHUSAN SEN & ORS.

A.I.R. 1936 Pat. 142=161 I.C. 695.

Entry stating holding rent free - landlord whether may file suit for rent.

Where the record of rights correctly stated that the defendants were holding certain tenure without paying any rent for it, it did not bar the landlord's right to obtain a decree for rent against the defendant. (*Mahammed Noor & Rowland JJ.*)

JYOTI PRASAD SINGH vs. RAJENDRA NARAYAN SINGH.

A.I.R. 1936 Pat. 287=162 I.C. 838.

Adoption of boundary line from the Record of Rights of neighbouring mouza - Effect of.

An entry in the Record of Rights operates in the same way between landlord and tenant as between landlords of the same or of the neighbouring estates or mouzas in any other districts in the matter of disputed boundary line; it cannot be ignored merely because, it is shown to have been based on the decision of any boundary line dispute and it is immaterial that the revenue survey

Records of Rights—(Contd.)

boundary was not ascertained. (*Dhalve & Agarwalla J.J.*)

BHUPNARAIN SINGH vs. HIRALAL.

17 P.L.T. 405=161 I.C. 709=A.I.R.
1936 Pat. 185.

REGISTRATION.

Deed registered in Book 4 instead of Book 1—effect.

A deed of transfer of immovable property was registered in Book 4 instead of Book 1. Held, that such an error in registration did not invalidate the transfer, 39 C. W. N. 1191 followed. (*McNair J.*)

GIRISH CHANDRA SEAL, IN THE MATTER OF.

A.I.R. 1936 Cal. 212=162 I.C. 650=
40 C.W.N. 1012

REGISTRATION ACT (XVI OF 1908).

Sec. 2 (5)—Flour Mill if immovable property.

A flour mill being capable of being transferred from one person to another and from one place to another, is not immovable property within the meaning of Sec. 2(6) of the Registration Act. 25 Bom. 629 followed. (*Agha Haidar J.*)

KHAN CHAND vs. NUR MCHAMMED

38 P.L.R. 375=A.I.R. 1936 Lah. 242=
161 I.C. 631.

Sec. 2(6) & T. P. Act. Sec. 3—Right to receive future rents and profits of immovable property, if immovable property.

A right under a deed of settlement to receive rents and profits of immovable property, even though such income may have to be received from the hands of trustees, is immovable property within the meaning of the Registration Act and the T. P. Act, in so far as the right relates to future rents and profits. An assignment of such a right would be governed by the provisions contained in the said Acts as to transfers of immovable property and evidence thereof. But rents and profits which, at the time of the assignment, have already been received

Registration Act—(Contd.)

by the trustees of the settlement, or even have accrued are not immovable property (*Sir George Rankin*).

M. E. MOOLLA SONS LTD. vs. OFFICIAL ASSIGNEE, RANGOON HIGH COURT.

40 C.W.N. 1253=71 M.L.J. 440=
17 P.L.T. 653=1936 A.W.R. 809.

Sec. 2(6) & T.P. Act. Sec. 3—Assignment of right to future income of immovable property, if must be by registered instrument.

Where the interest of the assignor was a vested right in the income and a contingent right in the corpus of immovable property, i.e., a right to receive a share of the income from the hands of trustees and right to receive a share of the ultimate sale proceeds of the property, such sale to take place after the happening of a certain event, held, that the interest was immovable property for the purposes of the Transfer of Property Act and Registration Acts, limiting the interest in the first head to future income. (*Sir George Rankin*).

M. E. MOOLLA SONS LTD. vs. OFFICIAL ASSIGNEE, RANGOON HIGH COURT.

40 C.W.N. 1253=71 M.L.J. 440=
17 P.L.T. 653=1936 A.W.R. 809

Sec. 17—Lease for 7 years—document if requires registration.

A document to be evidence in contract of lease of immovable property for a period of 7 years requires to be registered under Sec. 17, of the Registration Act, and if it is not registered, it is inadmissible in evidence. (*Jail Lal J.*)

ALI GAUHAR vs. MAHAMMED.

38 P.L.R. 590.

Sec. 17—Surrender of property exceeding Rs. 100 in value—registration if compulsory.

In order to show that a party has contracted himself out of his rights and surrendered what he had already acquired with reference to the property the value of which exceeds Rs. 100, the transaction must be

Registration Act—(Contd.)

evidenced by a registered document, having regard to the provisions of Sec. 17 of the Registration Act. (*Mitter & Patterson JJ.*)

KRISHNA PRASAD ROY CHOUDHURY
vs. SECY. OF STATE.

63. C.L.J. 52 = A.I.R. Cal. 1937 774.

Sec. 17—Compromise decree affecting immovable property not in suit, if compulsorily registrable—Decree holder having Receiver appointed and Receiver obtaining possession effect of.

A compromise decree creating a charge over certain properties which were not the subject matter of the suit is compulsorily registrable under Sec. 17 of the Registration Act. The possession of a receiver, caused to be appointed by the holder of such a decree in execution is not possession in part performance of a contract so as to make Sec. 53A of the T. P. Act available and to cure the effect of non-registration of the decree. (*Panckridge J.*)

SIMBHURAM BERIWALA vs. GULZARILAL THAKUR.

40 C.W.N. 974 164 I.C. 1009.

Sec. 17(1)—Jamabandi signed by tenant, showing increase of rent for increase of area of agricultural holding, if compulsorily registrable.

A jamabandi signed by the tenant, showing an increase of rent in respect of the increased area of an agricultural tenancy created by oral lease, is not compulsorily registrable under Sec. 17 (1) of the Registration Act. 3 Cal. 864 followed. (*Edgley J.*)

RADHARAMAN CHOWDHURY vs. PURNA CH. MAITRA.

40 C.W.N. 1330.

Sec. 17(1) (b)—"Phatbandi"—registration, when necessary.

Where in a phatbandi lists are drawn up purporting to show which are allotted to the plaintiffs and which are allotted to the defendants, and it is a formal document

Registration Act—(Contd.)

signed by all the parties, and is in substance and intention a document which purports to declare the rights of the parties in the plots in suit, it requires registration under Sec. 17(1)(b), Registration Act, and is inadmissible in evidence, if it is unregistered. (*Collister J.*)

NEPAL RAI vs. PARAS RAM DUBE.

1936 A.W.R. 1110.

Sec. 17 (1) (b)—Sale of equity of redemption in a mortgage valued at less than Rs. 100, if requires registration.

The sale of the equity of redemption in a mortgage the value of which is less than Rs. 100, prima facie does not pass any interest in immovable property of the value of Rs. 100, or upwards, and therefore does not require registration under Sec. 17 (1) (b), Registration Act. 48 C. L. J. 553 not followed (*Beaumont C. J. and Wadia JJ.*)

PITAMBAR KHEMJI GUJAR & ORS. vs. RAJARAM SHAHA JIARF SURBARAO MAHAMMUKAR.

60 Bom. 220 = 38 Bom. L.R. 205 = A.I.R. 1936 Bom. 175 162 I.C. 269.

Secs. 17 (1) (b) & 49—Reference of dispute to arbitrator—award, when affecting immovable property, if compulsorily, registrable.

Where the parties by a deed of reference refer their disputes to an arbitrator, and the arbitrator gives his award, declaring the right of the parties in immovable property, worth more than a hundred rupees, the award is compulsorily registrable under Cl. (b) of Sec. 17 (1) of the Registration Act. (*Courtney Terrel C. J. & Fazl Ali J.*)

BADRI CHAUDHURI vs. MSST. CHAMPA CHAUDHURAIN.

15 Pat. 579.

Secs. 17 (1) (d) & 90 (1) (d)—Lease for use and occupation of buildings, if exempt from registration.

Registration Act—(Contd.)

Where the wordings of a lease clearly and definitely refers to the use and occupation of building, they must be taken as leases of immovable property falling under Sec. 17(1) (d), Registration Act, but they are not exempt from registration under Sec. 90 (1) (d) as grants or assignment of an interest in land. 36 All. 17 approved; 6 Pat 446 distinguished. (*Beckett J.*)

AMIR CHAND vs. SECRETARY OF STATE

38 P.L.R. 770 = A.I.R. 1936 Lab. 26 = 161 I.C. 918.

Sec. 17 (2)(vi) (before amendment of 1929)—*Solennam creating permanent lease and incorporated in decree, if admissible in evidence without registration.*

A solennam creating a permanent lease and incorporated in the decree prior to the amendment of Sec. 17 (2)(vi) of the Registration Act by Act XXI of 1929 is admissible in evidence though unregistered. 47 Cal. 485 followed. (*Edgley J.*)

ABDUL RAHAMAN MOLLA vs. ABDUL HOSSAIN MOLLA.

40 C.W.N. 585.

Sec. 17 (2) (vi) — Compromise decree comprising property outside suit passed before 1st April, 1930, if requires registration.

A compromise decree passed before 1st April 1930, does not require registration under Sec. 17 of the Registration Act even though it comprises property outside the suit. (*Mukherjee & S. K. Ghosh JJ.*)

BAHADUR SINGH vs. RANI JYOTIRUPA DEBI.

40 C.W.N. 1176.

Sec. 17 (2) (viii) — Application to Revenue Officer requesting partition in a particular way, if requires to be registered.

An application made by the parties to a partition proceeding requesting the Revenue officer to effect a partition in a particular way cannot be said to be an instrument of partition and therefore it is not required to be registered. It is merely an

Registration Act—(Contd.)

application to effect a partition or a recital of partition which has already been effected by the parties. An instrument of partition would have followed the order passed by the Revenue officer directing partition according to the terms contained in the application. 96 I. C. 227 distinguished. (*Jaiswal J.*)

NUR MAHAMMAD vs. AMIR

38 P.L.R. 567 = 161 I.C. 3 = A.I.R. 1936 Lab. 708

Sec. 28.—Registration in District, small property situated wherein included in deed, if valid.

Registration in a certain Registration District on the strength of a small property situated therein and included in the deed is invalid when there is no real intention that such property should pass under the instrument, although when there is such intention, the motive that the property is included for the purpose of allowing registration in the particular district may be immaterial. (*Sir George Lowndes.*)

VENKATARAMA RAO vs. SOBHANADRI APPA RAO.

63 I.A. 169 = 59 Mad. 539 = 63 C.L.J. 382 = 40 C.W.N. 545 = 1936 A.W.R. 311 = 161 I.C. 29 = A.I.R. 1936 P.C. 91 = 1936 A.L.J. 258 = 70 M.L.J. 378 = 38 P.L.R. 308 = 43 M.L.W. 456 = 19 N.L.J. 89 = 38 Bom. I.R. 457 = 1936 M.W.N. 305 = 1936 O.W.N. 278.

Sec. 32 — Person signing a document on behalf of another on the basis of a Power of Attorney, if a person executing a document.

A person who has a power of attorney from another to execute a document and on the basis of such power signs a document on behalf of a principal is not a person executing a document within the meaning of Sec. 32 of the Registration Act. (*Nasim Ali & Edgley J.*)

SATISH CHANDRA BASU vs. HARENDRA KUMAR GHOSH.

40 C.W.N. 1051 = A.I.R. 1936 Cal. 442 64 C.L.J. 31.

RELIGIOUS ENDOWMENT

Mortgage of temple service inam lands, if valid.

In the case of temple service inam lands, public policy requires that the property should as far as possible be kept out of the reach of the creditors of the holder of the inam to secure the due performance of the service in which the public are interested. A mortgage of the property would *prima facie* be detrimental to the interests of the temple and is therefore invalid. (*Venkata ramana Rao J.*)

RAMANATHAN CHETTIAR *vs.* KALIDASA KAVANDAN.

71 M.L.J. 398=44 M.L.W. 505=
1936 M.W.N. 982=A.I.R. 1936 Mad.
559=163 I.C. 724.

Power of Shebait to grant lease.

When a shebait grants a permanent lease at a fixed rent, it must be found that the entire amount raised as selami was necessary to meet the actual pecuniary pressure on the estate. It must also be shown that the amount actually required for meeting the present needs of the estate could not be raised by a lease for a term or even in perpetuity at a variable rent. It must also be shown that there was no immediate prospect of getting sufficient money from the rents and profits of the estate. If the Court is not satisfied on those points the permanent lease is liable to be set aside. (*Nasim Ali J.*)

RAGHUMONI RAI *vs.* BIBHUTI BHUSAN ROY.

64 C.L.J. 65=A.I.R. 1936 Cal. 256=162 I.C. 790.

Suit against debuttar estate—proper person to defend.

The Shebait or trustee is *prima facie* the proper person to defend a suit against the debuttar or trust property, and the decision in a suit so defended will bind the Shebait himself, the successive Shebait, the deity, and the *cestiue qui trust*, unless and until fraud or negligence is established

Religious Endowment—(Contd)

on the part of the Shebait. (*Ameer Ali J.*)

PASUPATINATH SEAL *vs.* PRADYUMNA KUMAR MALLICK.

63 Cal. 454.

Transfer of Shebaitship—validity of.

The transfer of shebaitship is absolutely void in the absence of any custom sanctioning such transfer. (*Mitter & Peterson JJ.*)

PROSONNO DEB RAIKAT *vs.* BENGAL DOQARS BANK LTD.

[1 J. 379=A.I.R. 1936 Cal. 744.

RES JUDICATA

Plea of res judicata not taken in appeal, if can be taken on suit being remanded.

Where the respondents, although entitled to support the order of dismissal of the suit on the ground of *res judicata* fail to do so, they are precluded from raising the plea subsequently in the trial court, on the case being remanded to that Court for being heard on merits. (*Cunliffe & Henderson J.*)

KHAJE HABIBULLA & ORS. *vs.* BEPIN CH. RAI & ORS.

A.I.R. 1936 Cal. 454

Obiter dicta, if operates as resjudicata.

When the opinion expressed in a case is really obiter for the purpose of that case, that opinion in that case does not operate as *resjudicata*. (*Addison & Sule JJ.*)

NARAIN SINGH *vs.* WARIUM SINGH.

38 P.L.R. 790=A.I.R. 1936 Lah. 18.

Principle of constructive res judicata, if applies to execution proceedings.

The principle of constructive *res judicata* forms part of the general principle of *res judicata* and therefore applies to execution proceedings as well. 66 I. C. 693, 21 N. L. R. 23 relied, 9 All. 269 explained. (*Vivian Bose J.*)

MST. LAXMI BAI *vs.* SEWARRAM.

I.L.R. 1936 Nag. 30=19 N.L.J. 129=
[1651.C. 946=A.I.R. 1936 Nag- 123.

Res-judicata (Contd.)

Execution by one decree-holder not objected to—Subsequent objection, if barred.

The rule of constructive res judicata applies to execution proceedings. Thus where the objection that the decree cannot be executed by one of the joint decree-holders only is not taken at the earliest opportunity but the decree is allowed to be executed partially, the objection cannot be taken at a subsequent stage. (*Skemp J.*)

MST. DURGA DEVI vs. MATHRA DAS.

38 P.L.R., 580.

Application for restitution or application for execution of part of a decree—Principle of resjudicata, if applicable.

Where the execution of a decree has been allowed to proceed and without any objection by the judgment-debtor which was open to him and which he had opportunity to make in such proceedings he is not entitled to raise such objection in subsequent execution proceeding as the principle of resjudicata debars him from doing so. But the above principle has no application to restitution or even to application for execution of a portion of the decree. (*Jaiswal J.*)

PUNJAB NATIONAL BANK LTD. vs. NARNHEMAL JANKIDAS FIRM.

**38 P.L.R. 723=A.I.R. 1936 Lah. 246
= 163 I.C. 97.**

Application for revision rejected on the ground that decision was appealable—Court if can grant rule on a subsequent occasion.

An application for a rule and its rejection does not make the matter res judicata and does not prevent a court on a subsequent occasion, if the occasion arises from granting a rule in the interests of justice. (*Wort J.*)

NASIRUDDIN HAIDAR vs. MOHAMMAD TAHIR.

A.I.R. 1936 Pat. 119=161 I.C. 26.

Execution application—Requirements of Or. 21 rr. 11-14 not complied with—Order

Res judicata—(Contd.)

rejecting application—Whether res-judicata.

Where an application for execution does not comply with the requirements of Or. 21, rr. 11-14, C. P. Code, and the Court rejects the application as being not maintainable, the order does not operate as resjudicata in a subsequent proceeding in which the question is whether the previous application was according to law. (*Sualiman C. J. & Bennet J.*)

MAHAMMAD SAKIR DAD KHAN vs. NAND KISHORE.

**1936 A.W.R. 527=1936 A.L.J. 571=
163 I.C. 841=A.I.R. 1936 All. 467**

Finding by Court that secured creditor had relinquished his security for benefit of creditors—order not appealed against—question whether creditor had relinquished security or not, if resjudicata.

Where the Court finds that a secured creditor has relinquished his security for the general benefit of the creditors and the order has not been appealed against, the question whether the creditor has relinquished the security or not is res Judicata having been finally and conclusively determined and cannot be re-agitated subsequently. (*Roberts C. J. & Baguley J.*)

BANK OF CHETTINAD vs. KO TIN.

14 Rang. 529=164 I.C. 1063=A.I.R. 1936 Rang. 393.

RESTITUTION.

Right to claim refund against decree-holder.

The right of the auction-purchaser to a refund of the money paid by him is recognised against the decree-holder in Or. 21, r. 93, C. P. Code. In principle there is no difference so far as the liability of the decree-holder is concerned, whether the sale is set aside under Or. 21, r. 92 or under Sec. 47 of the Code. (*Jaiswal J.*)

RANBIR SEN vs. MOHAMMAD DIN.

A.I.R. 1936 Lah. 497

REVIEW.

Judgment based on misapprehension of nature of attachment if can be reviewed.

A decision of the judge in a matter relating to attachment which is sought to be reviewed if based on an obvious misapprehension of the nature of attachment, it is sufficient reason for review. (*Jailal J.*)

GURDIAL SINGH vs. KHAZAN CHAND,
A.I.R. 1936 Lah. 486 = 163 I.C. 374.

REVISION.

Chief Court in Oudh, if competent to interfere in revision with an order by an Assistant Collector, second class, setting aside an ex parte decree for arrears of rent.

The Chief Court in Oudh has no authority to interfere in revision with an order passed by the Court of an Assistant Collector of the Second Class, that Court being not a Court subordinate to the Chief Court within the meaning of Sec. 115 C. P. Code. (*King C. J.*)

GHANI AHMED vs. NANNHU & ORS.
1936 O.W.N. 724 = 163 I.C. 930.

Decree passed in terms of an award, if open to revision.

A decree which has been passed in terms of an award by an arbitrator to whom the dispute had been referred by the Court at the instance of the parties, cannot be questioned in revision, the policy of the law being that there should be no appeal from a decree passed in the terms of an award. (*Agha Haidar J.*)

MUSLIM BANK OF INDIA, LTD., vs. MUHAMMED HAYAT.

38 P.L.R. 783

RIPARIAN RIGHTS

Right of riparian owner to put up erections.

A riparian owner cannot interfere with the lives, that is the natural bed of the river, or a recognised flood channel in any circumstances, whether actual damage or likelihood of damage to other riparian

Riparian Rights—(Contd.)

owner is proved or not. But on his own land, he may erect any where defences against floods or obstructions at times of extraordinary floods subject to the condition that he must not interfere with the alive or a recognised flood channel and that when flood water comes on to his own land, he must not take active steps to turn it to his neighbour's property. (*Mukherji & Ghosh JJ.*)

LANKAPARA TEA CO., LTD., vs. GOPALPUR TEA CO., LTD., & ORS.

63 Cal. 1008 = 40 C.W.N. 916 = 63 C.L.J. 210.

Plaintiffs having a flour mill on a river—Defendant raising height of a bund further below the river—Interference with working of plaintiff's mill—Suit for damages, if lies.

The plaintiffs brought a suit for damages caused to the working of their flour-mills on a river by the raising of the height of a bund two miles further down the river for similar mill by the defendants. The evidence established that the dam raised by the defendants had caused a rise of 11 inches in the river of the stream below the dam of the plaintiffs. Held that the raising of the level by this small amount was not such an interference with the natural rights of the plaintiffs as could give rise to a right to sue for damages. (*Sullaiman C. J. & Bennet J.*)

MURTI vs. HANUMAN PRASAD.

1936 A.L.J. 534 = 1936 A.W.R. 507

RIWAJ-I-AM

Entry as to special custom in Riwayatam—Admissibility of.

An entry in the Riwayatam recording a special custom is admissible to prove the statement alleged therein even if the statement be unsupported by instances and the onus of rebuttal lies upon the party disputing the correctness of the entry. (*Jailal & Sale JJ.*)

JAWALA SINGH vs. THAKUR SINGH.

A.I.R. 1936 Lah. 88 = 162 I.C. 934.

SALE OF GOODS ACT (III OF 1930)

Sec. 16 (1) (2)—*Sale by retailers of wooden garments treated with excess free sulphites—Purchaser contracting disease by wearing same—Retailer's liability in contract.*

The appellant purchased woollen garments from retailers and wore them and contracted Dermatitis of external origin by reason of presence in the garments of excess free sulphites due to negligence in manufacture. The appellant claimed damages against both retailers and manufacturers. *Held*, that the retailers were liable in contract for breach of implied warranty or condition under Exceps. 1 & 2 of the South Australia Sale of Goods Act, the provisions of which are identical with those of Sec. 16 of the Indian Sale of Goods Act. (*Lord Wright*.)

RICHARD P. GRANT vs. AUSTRALIAN KNITTING MILLS LTD.

1936 A.W.R. 255 = 1936 A.L.J. 120.

Sec. 33—*Sale of wood of fallen trees—delivery of possession when takes place.*

In the case of a sale of the wood of certain fallen trees, the fact that the buyer has cut up the fallen trees does not amount to taking possession of them, and possession would pass to the buyer only when he puts the wood into carts and takes it away. If he is prevented from doing this by a third party, he can claim a refund of the purchase money from the seller. (*Bennet J.*)

CHOTRU vs. RAM NATH SAHU.

1936 A.W.R. 1010 = 1936 A.L.J. 1270
= A.I.R. 1936 All. 880.

Secs. 45, 46 & 54—*Right of commission agent to resell goods.*

Under Sec. 46, Sale of Goods Act, an unpaid seller has a right to re-sell the goods in the circumstances provided by the Act and Sec. 54 of the Act authorises the unpaid seller to resell after giving due notice. A commission agent is entitled to the remedy given to an unpaid seller in Sec. 45 of the Act and he has therefore a right to retain and resell goods for which he has paid as if he had been an unpaid seller. (*King C. J.*)

JAGRAM DAS vs. BANARSI DAS.

1936 O.W.N' 528 = A.I.R. 1936 Oudh.
303 = 162 I.C. 746.

SANTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872)

Provisions of the Act if excludes extension of other laws to the district.

The Santhal Parganas Act, 1855 does not prevent subsequent addition of other laws to those made applicable thereby to the Santhal Parganas and the Civil Procedure Code has since been extended to the district by the Santhal Parganas Justice Regulation, 1893. (*Sir Shadi Lal J.*)

NRISINGHA CH. NANDY CHOUDHURY vs. RAJANITI PRASAD SINGH & ORS.

15 Pat. 567 = 40 C.W.N. 1061 = 17 P.L.T. 462 = 71 M.L.J. 60 = 163 I.C. 49 = 38 Bom. L.R. 768 = 63 C.L.J. 476 = A.I.R. 1936 P.C. 189.

Sec. 2—*Procedure followed by the Santhal Courts.*

The "Santhal Courts", that is the Courts of the officers appointed under Sec. 2 of the Santhal Parganas Act are governed by procedures of their own prescribed by the Local Government. Some provisions of the C. P. Code relating to the transfer of decrees have been made applicable to suits tried in these courts by Regulation III of 1872. (*Khawja Mohammed Noor & Saunders J.*)

JOKHI RAM SAGORMAL vs. MAHADEB MARWARL.

17 P.L.T. 57 = A.I.R. 1936 Pat. 104.

Secs. 5 (2) & 5A (1)—*Suit relating to land lying partly in Santhal Parganahs and partly in another district instituted before Settlement officer, if may be transferred by him to Subordinate Judge of the other district.*

When a suit relating to land situated partly in the Santhal Parganas and partly in another district is instituted under Sec. 5 (2) of the Santhal Parganas Settlement Regulation before the officer mentioned therein, such officer can under Sec. 5 A (1) transfer the suit to the appropriate

Santhal Frgs. Settlement Regulation

—(Contd.)

Court in the other district. (Sir Shadi Lal).

NRISINGHA CH. NANDY vs. RAJNITI PROSAD SINGH.

15 Pat. 567 = 40 C.W.N. 1061 = 17 P.L.
T. 461 = 71 M.L.J. 60 = 163 I.C. 49 = 35
Bom. L.R. 768 = 63 C.L.J. 476 = A.I.R.
1936 P.C. 189.

Sec. 6 - Power of Court to award interest from date of decree to date of realisation.

Sec. 6 of the Santhal Pargannas Regulation only lays down that the interest decreed on a loan or debt is not to exceed the principal. When once a decree has been passed the loan or debt as the subject of enforcement no longer exists; it is in effect merged in the decree, and the allowance of interest on the decree, is not the allowance of additional interest on the loan or debt. Thus there is no reason why interest at the Court rate should not be decreed, on the amount due under the loan from the expiry of the date of grace to the date of realisation. (Sir George Llewellyn.)

KUSUM KUMARI vs. DEVI PROSAD DHANDHANIA.

63 I.A. 114 = 15 Pat. 210 = 70 M.L.J.
355 = 43 M.L.W. 268 = 1936 M.W.N.
308 = 40 C.W.N. 328 = 63 C.L.J. 154 =
17 P.L.T. 89 = 38 Bom. L.R. 349 = 1936
A.W.R. 204 = 1936 O.W.N. 283 = 1936
A.L.J. 108 = 160 I.C. 285 = A.I.R. 1936
P.C. 65.

Sec. 25 (a)—Settlement officer refusing to record name of claimant to zemindari—Suit under the section, if maintainable.

Sec. 25 (a), Santal Pargannas Settlement Regulation covers cases in which a settlement officer refuses to record the name of a claimant to a zemindari. The words 'zemindars' and 'proprietors' in the section mean persons who claim to be zemindars or proprietors as against any other zemindar or proprietor. (Mohammed Noor & Varma JJ.)

SITARAM SINHA vs. JOGENDRA NARAIN SINHA

17 P.L.T. 115 = A.I.R. 1936 Pat. 171
161 I.C. 706 = 15 Pat. 356.

SCHEDULED DISTRICTS (ACT XIV OF 1874.)

R. 9—Rule if prevents Privy Council from granting special leave to appeal.

The effect of r. 9 of the rules framed under the Scheduled Districts Act is to enable the local Government to constitute *pro hac vice* the Board of Revenue a Court of second appeal with full appellate jurisdiction. The provision in the rules that the order of the Board is to be final do not affect His Majesty's prerogative to grant special leave to appeal. (Sir John Wallis.)

MAHESH PROSAD SINGH vs. BADRI LAL SAHU.

63 I.A. 207 = 63 Cal. 990 = 40 C.W.N.
900 = 63 C.L.J. 363 = 38 Bom. L.R.
484 = 70 M.L.J. 663 = 1936 M.W.N. 593
= 43 M.L.W. 603 = 1936 A.I.J. 656 =
1936 A.W.R. 282 = 1936 O.W.N. 313
= 161 I.C. 673 = A.I.R. 1936 P.C. 108

SHIPPING.

Terms of a charter party, construction of.

The terms of a charter party contained, among others the following clause. "The owner will let and the charterer will take, for the purpose of towing flats and barges the steamship "Srikrishna"..... for a period of six months certain..... provided that the charterer shall not ply the vessel..... in salt water, nor use the same for any other purposes than towing flats and barges without the consent in writing of the owners."

Held, that in the absence of any other provision to the contrary, the agreement amounted to a demise of the vessel and the charterers were liable for negligence on the part of the master and the crew. (Pancridge J.)

VRAJA LAL vs. RANADA PROSAD SHAHA.

63 Cal. 53.

Disobeying Govt. rules regarding lights by sailing vessels—steam vessel colliding with same, if liable when absence of light is not cause of collision.

In a case of collision between a steamship and a sailing vessel which has failed to

Shipping—(Contd.)

comply with Government rules regarding the exhibiting of lights at night, the omission to exhibit proper lights is immaterial when it is shown that the absence of such lights was not the cause of the collision and did not conduce to it; but the onus is on such sailing vessel to prove that such was the case. (*Guha & Bartley JJ.*)

RIVER STEAM NAVIGATION CO., LTD.
vs. FIRM OF LATE RAM KANAI MADHAB
CH PAUL.

40 C.W.N 633=161 I.C. 994=A.I.R.
1936 Cal. 153.

SIND SAGAR DOAB COLONISATION ACT (I OF 1902)

Reclamation of land during continuance of Act.—“Adna Malkiyat” rights if can be claimed after repeal.

Certain lands were reclaimed by the plaintiff during the operation of the Sind Sagar Doab Act. The provisions of that Act debarred the acquisition of Adna Malkiyat rights during the period that the Act was in force. The Act having being repealed in 1929, the plaintiff claimed to be declared Adna maliks on payment of “Jhuri”. The defendants maintained that any reclamation made during the period when the Sind Sagar Doab Act was in force could not confer any proprietary right at all. *Held*, that the reclamation of land during the continuance of the Act could not result in the acquisition of any ‘Adna Malkiyat, rights at any time. (*Bhide & Currie JJ.*)

FATTEH SHER vs. BEHARI RAM.

17 Lah. 502=38 P.L.R. 1036=A.I.R.
1936 Lah. 956.

SOLICITOR.

Application by plaintiff's solicitor to recover costs—Amount of taxed costs paid into Court by defendant—defendant's right of set-off againsts plaintiff, if and when can be set up against such lien.

Where there has been an order for costs against the defendant and costs have been taxed, and the precise amount of taxed costs has been paid into Court, the defendant is

Solicitor—(Contd.)

not entitled to set off costs claimed by him against the plaintiff in answer to the plaintiff's attorney's claim to exercise his right of lien. (*Panckridge J.*)

HARIDAS DUTT vs. KALOORAM BHOW-SINGKA.

63 Cal. 746=40 C.W.N. 458.

SPECIFIC RELIEF ACT (I OF 1877.)

Sec. 9—*Right of lessees of a public ferry to collect tolls, if constitutes immovable property—suit under sec. 9, if maintainable.*

The lessee of a public ferry under Sec. 9 of the Northern India Ferries Act is merely the lessee of the tolls of a public ferry. The public ferry remains in the possession of the public authorities and all that is let is a right to collect the tolls of that public ferry. Such a right to collect tolls is in no way immovable property, and suit under Sec. 9 Specific Relief Act, is not maintainable in respect of such a right. (*Bennet & Ganga Nath JJ.*)

MOHAMMED WAHID vs. DISTRICT BOARD BEREILLY.

1936 A.W.R. 923=1936 A.L.J. 1122
=A.I.R. 1936 All. 856.

Sec. 42—*Suit for declaration of legitimacy, if maintainable.*

The question of legitimacy relates to the legal character of a person within the meaning of Sec. 42, Specific Relief Act, and there is nothing in that section to debar a person from claiming a declaration that he is the legitimate son of a certain person. 35 Cal. 777 & 31 P. L. R. 909 distinguished. (*Jailal J.*)

PIR SHAH vs. MAHMUD SHAH.

38 P.L.R. 455=A.I.R. 1936 Lah. 135
=161 I.C. 837.

Sec. 42—*Declaratory suit—suit for declaration that plaintiff is the legitimate son of the defendant without any prayer for declaration of title to property.*

Specific Relief Act—(Contd.)

The mere fact the defendant stated that the plaintiff was his illegitimate son, gives no cause of action to the plaintiff to institute a suit for a mere declaration, when such declaration does not affect any right to property. 38 P. L. R. 455 reversed. (*Addison & Abdul Raschid JJ.*)

MAHMUD SHAH vs. FIR SHAH.

A.I.R. 1936 Lah. 858.

Sec. 42—*Declaratory decree if may be made when injunction asked for as substantial relief, is refused as unnecessary.*

The principle that a declaration should be refused where the plaintiff asked for an injunction as the substantial relief and such relief cannot be granted does not apply where the Court holds that an injunction is unnecessary in view of the provisions of some law. (*Mukherji & S.K. Ghosh JJ.*)

LANKAPARA TEA CO., LTD., vs. GOPALPUR TEA CO., LTD., & ORS.

63 Cal 1008 40 C.W.N. 916 = 63 C.L.J. 211.

Sec. 42—*Bare declaration, not sufficiently specific, merely reciting the law and covering matters in respect of which injunction refused, if may be made,*

A bare declaration which is not sufficiently specific in character, which merely recites the law and which declares the disability of the defendant to do the very acts which the Court declines to restrain by an injunction cannot be supported and ought not to be made. (*Mukherji & S.K. Ghosh JJ.*)

LANKAPARA TEA CO., LTD., vs. GOPALPUR TEA CO., LTD., & ORS.

63 Cal 1008 = 40 C.W.N. 916 = 63 C.L.J. 211.

Sec. 42—*Resolution by District Board recommending acquisition of land—Suit by owner for declaration that resolution ultra-*

Specific Relief Act—(Contd.)

vires and for injunction restraining carrying out of sale, if lies.

A District Board passed a resolution recommending the acquisition of a plot of land. The owner of the land thereupon instituted a suit in the Civil Court for a declaration that the resolution was *ultra vires* and for an injunction restraining the carrying out of the resolution, on the ground that the resolution was unreasonable in character and vitiated for want of good faith and due regard for the interest of the owner. *Held*, that such a suit was maintainable. (*Guhle & Bartley JJ.*)

DISTRICT BOARD OF CHITTAGONG vs. SOSHI BHUSAN PAUL.

40 C.W.N. 687 = 162 I.C. 671 = A.I.R. 1936 Cal. 225.

Sec. 42—*Person admittedly in possession of mouza claiming land recorded in Survey as lying outside his mouza—Suit for mere declaration of title, if maintainable,*

Where a person who is admittedly in possession of a mouza claims land which has been recorded by the Survey and Settlement authorities as lying outside the mouza, he is not entitled to sue for a mere declaration of his title to the land in dispute without also suing for possession. It is open to him to bring a suit to establish his title and recover possession or in the alternative to show that he had come into possession since the dispossession implicit in the decision of the boundary line dispute under Sec. 41 Bengal Survey Act. (*Dhavit & Agarwalla JJ.*)

BHUPNARAIN SINGH vs. HIRALAL.

17 Pat. L.T. 40 = A.I.R. 1936 Pat. 185 = 161 I.C. 709.

Sec. 42—*Attachment voluntarily withdrawn on objection under Or. 21, r. 58—suit for declaration that property is liable to attachment, if competent.*

On objection to an attachment under Or. 21, r. 58, C. P. Code, by the defendant, the plaintiff withdrew the attachment. Later however he filed a suit for a declaration

Specific Relief Act—(Contd.)

that the property in question was liable to be attached and sold in execution of his decrees. *Held*, that the suit did not come within Or. 21, r. 63 C. P. Code, and the plaintiff, if he wanted the declaration to be made, had to bring the suit within Sec. 42, Specific Relief Act. (*Beaumont C. J.*)

JAMNABAI GULAB CHAND GUJARATI
vs. DATTATRAYA RAMCHANDRA GUJARATI

60 Bom. 226 = 38 Bom. L.R. 251 =
A.I.R. 1936 Bom 160 = 162 I.C. 260.

Secs. 42 & 54—*Plaintiff in possession of land—Defendant contesting plaintiff's right to be manager—Suit by plaintiff for declaration of his rights and for an injunction restraining defendant from interfering with his right, if maintainable.*

The plaintiff sued for a declaration that he was entitled to remain in possession of and entitled to the management of certain properties and for an injunction restraining the defendant from interfering with his management of the property. *Held*, that possession of the plaintiff was sufficient evidence of his title as owner against the defendant, and he was entitled to obtain the declaration and injunction which he sought to obtain. (*Currie J.*)

DIA PARKASH vs. BHANA MAL.

A.I.R. 1936 Lah. 241.

Sec. 45 (g)—*Power of Court to issue mandamus to public servant.*

The Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of an duty which as servant he may owe to the Crown, his principal. (*Sir George Rankin*)

COMMISSIONER OF INCOME TAX vs.
BOMBAY TRUST CORPORATION, LTD.

63 I.A. 408 = 1936 A.W.R. 848 = 1936
A.L.J. 1204 = 64 C.L.J. 194 = 41 C.W.N.
33 = A.I.R. 1936 P.C. 269 = 164 I.C. 18

Specific Relief Act—(Contd.)

Sec. 54—*Perpetual injunction restraining erections in bed of river if may be granted where Bengal Embankment Act in force.*

A perpetual injunction in favour of a lower riparian owner restraining an upper owner from erecting bunds, embankment or other obstructions in the bed of the river such as would impede obstruct or divert the natural flow and force of the water is not rendered unnecessary by the Bengal Embankment Act being in force in the area concerned in as much as the remedies available under the latter, are neither as certain or as complete as those available, under an injunction. (*Mukherji & S. K. Ghosh JJ.*)

LANKAPARA TEA CO., LTD., vs. GOPALPUR TEA CO., LTD., & ORS.

63 Cal. 1008 = 40 C.W.N. 916 = 63
C.L.J. 211

Secs. 54 & 56 (g)—*Suit for permanent injunction to close drain—Decree when may be granted.*

A suit for a perpetual injunction to close a drain should not be granted on the mere ground that water discharged from latrines in Indian houses should as a rule, be treated as nuisance. The Court should go into the evidence and come to a finding as to whether in the particular case the existence of the drain in respect of which the injunction is sought constitutes a nuisance. (*Srivastava J.*)

RIASAT ALI vs. ZAMIN ALI & ORS.

1936 O.W.N. 310 = 161 I.C. 411 =
A.I.R. 1936 Oudh. 211.

Sec. 54 & C. P. Code, Or. 41, rule 33—*Perpetual injunction refused by trial Court if may be granted by appellate Court in absence of appeal by plaintiff or prayer in cross—objection.*

The appellate Court has power to grant a perpetual injunction which the trial Court refused, and that even in a case where the plaintiff has neither appealed nor asked for an injunction in his cross objection, provided he has not abandoned that prayer

Specific Relief Act—(Contd.)

which was in his plant. (*Mukherji & S. K. Ghosh JJ.*)

LANKAPARA TEA CO., LTD., vs. GOPALPUR TEA CO., LTD. & ORS.

63 Cal. 1008 = 40 C.W.N. 916 = 63 C.L.J. 211,

Sec. 57 - *Agreement to have common manager and not to partition property for a certain period. Injunction, if can be granted restraining the breach of the agreement.*

Where the owner of a joint estate entered into an agreement to the effect that the estate was to be managed by a common manager for a certain period during which there was to be no partition of the estate, held, that the effect of the agreement was that the parties had agreed not to do that which they ordinarily had a right to do. The agreement although affirmative in form was negative in substance, and therefore Sec. 57 of the Specific Relief Act was applicable, and an injunction could be granted for restraining a party to the agreement who sought to break the contract, from doing so. (*Wort A. C. J.*)

KIRTYANAND SINHA vs. RAMANADA SINHA.

17 Pat. L.T. 865 = A.I.R. 1936 Pat. 456 = 164 I.C. 220.

STAMP ACT (II OF 1899)

Sec. 2(5)—*Document for the supply of goods and for payment of damages on breach of its terms—Stamp duty payable.*

By a document described as "Satta" the executant agreed to supply to the person in whose favour the document was executed a certain quality and quantity of goods at a fixed rate during a specified period. The document also contained several provisions as regard the quality of the goods and a condition for payment of damages at a certain rate in case of breach of agreement. Held, that the document was to be treated as an agreement and not as a bond for the purpose of payment of stamp duty. (*Srivastava & Nanavutty JJ.*)

SUNDAR LALL vs. GANDHARAP SINGH
1936 O.W.N. 348 = 161 I.C. 420.

Stamp Act—(Contd.)

Sec. 2 (5)—*Bond—Definition of—Acknowledgment entry attested by witnesses and containing implied promise to pay interest, if constitutes a bond.*

The definition of a bond requires that a person should oblige himself to pay money to another on certain conditions. In other words, there must be an express obligation to pay. Therefore an acknowledgment entry attested by two witnesses and containing an implied promise to pay interest and without any express obligation to pay the amount due, is not a bond. (*Jai Lal & Sale JJ.*)

DEWAN CHAND vs. PUNJAB & KASHMIR BANK LTD., RAWALPINDI

38 P.L.R. 269.

Secs. 2 (5) & (17) and 6—*Document mortgaging executant's sugarcane crop and also stipulating delivery of crop to mortgagee at certain rate—nature of the document—stamp duty payable.*

Where under a document, the sugarcane crop of the executant is mortgaged for payment of money advanced by the mortgagee, and the document also contains a stipulation that the executant would supply the aforesaid sugarcane crop exclusively to the sugar work of the mortgagee at a certain rate, the instrument fills the dual character of a mortgage and a bond, as defined in Sec. 2 (17) & 2 (5) respectively of the Stamp Act, and the necessary result of the view is that Sec. 6 of the Stamp Act becomes applicable to an instrument of this kind, and the highest of the two duties provided for by the Stamp Act is payable. (*Niamatullah, Harries & Rakhpal Singh JJ.*)

STAMP REFERENCE BY BOARD OF REVENUE UNDER SEC. 57, STAMP ACT.

1936 A.L.J. 1185 = 1936 A.W.R. 1144
= 163 I.C. 614 = A.I.R. 1936 All. 488.

Sec. 2 (12)—*Effect of signature on a document.*

Signature alone does not in all cases complete the execution of a document for the purpose of giving it legal validity: but for the purpose of the Stamp Act,

Stamp Act—(Contd.)

cl. 12 of Sec. 2 makes all documents which are chargeable with duty, when executed chargeable as soon as they are signed by the executant. (*Addison Coldstream & Abdul Rashid JJ.*)

SHAMSDIN vs. COLLECTOR OF AMRITSAR.

17 Lah. 223=38 P.L.R. 558=162 I.C. 774=A.I.R. 1936 Lah. 449.

Secs. 2 (12) & 40 (1) (b) *Proprietor of firm executing deed selling a property to creditor in part of debt and stipulating to pay balance to debtor—deed also signed by creditor firms as vendee—nature of the deed executed.*

By a deed, the proprietor of a debtor firm conveyed certain property to a creditor in part payment of its debt and agreed to repay the balance within a fixed period. The deed was also signed by the creditor who described himself as the vendee. Held, that the creditor could not be said to have drawn, made or executed any bond to pay the balance within the meaning of clause 12 of Sec. 2, for a person cannot by his own instrument bind another person to pay him money. Assuming however that the deed implied a promise of forbearance to sue until the expiry of the period fixed for repayment, it would be an agreement and not a part of the bond, and as such would be chargeable with a duty of one rupee. (*Addison Coldstream & Abdul Rashid, JJ.*)

SHAMS DIN & ORS. vs. COLLECTOR OF AMRITSAR.

17 Lah. 223=38 P.L.R. 558=162 I.C. 774=A.I.R. 1936 Lah. 449.

Sec. 2 (24) — Settlement, meaning of—*disposition of successive interests by way of trust, if essential.*

Settlements contemplated by Sec. 2 (24) of the Stamp Act are dispositions of successive interests in property, movable or immovable, in consideration of matters or for objects specified in the section. Under

Stamp Act—(Contd.)

lying the idea of settlement, there is a notion or conception of trust.

RHUPATI NATH CHAKRAVARTY vs. BASANTA KUMARI DEBI.

63 Cal. 1098=40 C.W.N. 1320=A.I.R. 1336 Cal. 556.

Sec. 2 (24) & Art. 33—Deed called deed of settlement dedicating property absolutely to idol and extinguishing donor's title, if deed of trust or settlement or gift—duty payable on such a deed.

A deed styled a deed of settlement, whereby the title of the donor is extinguished and the properties are dedicated absolutely to idols some of whom are in existence and who are said to become *maliks*, is not a trust deed nor a deed of settlement within the meaning of Sec. 2, cl (24) of the Stamp Act, but a deed of gift. Accordingly, the duty payable on such a deed is that laid down in Art. 33, of the Stamp Act for deeds of gift. (*D. N. Mitter & Patterson JJ.*)

BHUPATI NATH CHAKRAVARTY vs. BASANTA KUMARI DEBI.

63 Cal. 1098=40 C.W.N. 1320=A.I.R. 1936 Cal. 556.

Sec. 5—Vakalatnama providing for payment of fees to pleader and making acting and appearance dependant on advance payment, if to be stamped as agreement.

A vakalatnama, containing a stipulation to the effect that the pleader is to receive certain fees for the work to be done and that he will not be bound to act and appear if fees are not paid in advance, does not require to be stamped as an agreement under the Indian Stamp Act in addition to being charged to court fees as a vakalatnama.

RADHA GOBINDA SEN vs. RAM BRAHMA MONDAL.

40 C.W.N. 1320=A.I.R. 1636 Cal. 814

Sec. 12—Cancellation of Stamp—mode of cancelling,

Stamp Act—(Contd.)

The object of cancelling adhesive stamps affixed to instruments is to prevent the same stamps from being used more than once. The terms of sub-Sec. (3) of Sec. 12 clearly show that it is not intended to lay down any special manner of cancellation which must be rigidly followed in every case. A signature running across the whole of the stamp constitutes an effective cancellation within the meaning of Sec. 12 (1) (a) of the Act. (*Srivastava & Nanavutty-JJ.*)

G. A. HEVEN vs. SULTAN KHAN.

1936 O.W.N. 245 = 161 I.C. 150 = A.I.R. 1936 Oudh. 176

Sec. 35 & Sch. 1, Arts. 1 & 5—
Promissory note deficiently stamped if can be used as acknowledgment of debt.

A defectively stamped promissory note cannot be used in evidence as an acknowledgment of a debt, either as it is or after being impounded. 8 Cal. 645 & 21 Bom. 201 followed. (*R. C. Mitter, J.*)

JOGENDRA CHANDRA BANERJEE vs. SACHINDRA KUMAR SEAL.

63 Cal. 513 = 40 C.W.N. 399.

Sec. 36—Document insufficiently stamped but admitted in evidence—Court, if may impound & direct payment of deficit duty by given date.

When an insufficiently stamped document is produced before a Court, the Court acts irregularly in admitting it in evidence and thereafter impounding it and making an order that the deficit duty and the penalty must be paid by a certain date. (*D. N. Mitter & Patterson JJ.*)

BHUPATI NATH CHAKRAVARTY vs. BASANTA DEBI.

63 Cal. 1098 = 40 C.W.N. 1320 = A.I.R. 1936 Cal. 556.

Sec. 36—Document once admitted in evidence—admission, if may, be questioned in trial court or in appeal—court admitting

Stamp Act—(Contd.)

document, if may impound or direct payment of deficit duty by given date.

Once a document has been admitted in evidence, such admission cannot be questioned on the ground of insufficiency of the Stamp duty paid, either in the trial Court or in appeal or revision. And so, where the trial Court admitted a document but made an order that the deficient portion of the Stamp duty must be paid by a certain date and such duty was not paid, it cannot be urged that the document ought to have been excluded from the evidence by the trial Court or that it ought to have been excluded in the appeal. 15 C. L. J. 569, 29 C. L. J. 395 & 27 C. W. N. 513 followed. (*D. N. Mitter & Paterson JJ.*)

RHUPATI NATH CHAKRAVARTY vs. BASANTA KUMARI DEBI & ORS.

63 Cal. 1098 = 40 C.W.N. 1320 = A.I.R. 1936 Cal. 556

Sec. 44 (1) — Person paying deficiency in stamp, if may maintain suit for contribution against others liable to pay the same.

Under Sec. 44 (1) Stamp Act, a person who being one bound to provide the proper stamp duty pays the deficiency, has no right to sue for contribution from any other person. (*Ganganath J.*)

PARSOTTAM RAM vs. SHEOMANGAL RAM.

1936 A.L.J. 1187 = 1936 A.W.R. 33 = A.I.R. 1936 All. 151 = 160 I.C. 70

Sec. 44 (3)—Plaintiff paying deficiency in stamp duty—amount not included in costs in the suit—subsequent suit for recovery of amount against defendants in former suit, if barred.

Where the deficiency in the Stamp duty paid by a plaintiff is not included in the costs of the suit in which the insufficiently stamped instrument is filed, a subsequent suit by the plaintiff for recovery of the same amount against the persons who were

Stamp Act—(Contd.)

defendants in the former suits is barred by Sec. 44 (3), Stamp Act. (*Ganganath J.*)

PARSOTTAM RAM vs. SHEOMANGAL RAM.

1986 A.L.J. 187 = 1936 A.W.R. 33 = A.I.R. 1936 All 151 = 169 I.C. 70

Secs. 61 (2) & (4) — Appellate Court, if may determine both duty and penalty.

Under Sec. 61 (2) of the Stamp Act which is to be read with the proviso to cl. (1), a Court of Appeal or Revision can determine not only the duty payable on an instrument, but also the penalty. (*D. N. Mitter & Patterson JJ.*)

BRUPTI NATH CHAKRAVARTY vs. BASANTA KUMARI DEVI.

63 Cal. 1098 = 40 C.W.N. 1320 = A.I.R. 1936 Cal. 556.

Sec. 62 — Persons signing as witness to an improperly stamped instrument, if liable to be prosecuted.

The words "signing other wise than as a witness" in Sec. 62, Stamp Act must be read together. A witness to an instrument does not draw, make or execute it. Sec. 62, does not make criminal the execution of an improperly stamped instrument by a witness, but the signing of it by persons other than witnesses. (*Addision Coldstream & Abdul Rashid JJ.*)

SHAMS DIN vs. COLLECTOR OF AMRITSAR.

17 Lah. 223 = 38 P.L.R. 558 = 162 I.C. 774 = A.I.R. 1936 Lah. 449

Sec. I, Arts. 1 & 5 — Entry in vendor's account book of sale of certain goods on credit — thumb mark by purchaser — stamp duty, if necessary.

An entry in the books of the vendor of a transaction of sale of certain goods on credit, thumb-marked by the purchaser, is not an agreement or memorandum of agreement under Art. 5 of the Stamp Act, nor is it an acknowledgment of a debt covered by Art. I. It is merely a memorandum of a transac-

Stamp Act—(Contd.)

tion of sale and does not require to be stamped (*Tek Chand, Dalip Singh & Rangilal JJ.*)

NANAK CHAND vs. FATTU.

17 Lah. 1 = 38 P.L.R. 390

Sch. 1, Art. 5 — Acknowledgment in writing of debt under pronote, also containing express promise to pay, if and when liable to duty as agreement — consideration for and acceptance of by creditor.

A written acknowledgment of liability under a pronote for the purpose of saving limitation, also containing an express promise to pay, is liable to stamp duty as an agreement under Art. 5 of Schedule I of the Stamp Act, when the language shows it to be the memorandum of an oral agreement between the parties — by the creditor not to bring a suit for the present and by the debtor to pay the entire debt. (*Nasim Ali & Edgley JJ.*)

BOGRA LOAN OFFICE, LTD. vs. JYOTISH CH. CHANDA.

40 C.W.N. 1181 = 165 I.C. 520 = A.I.R. 1936 Cal. 399.

Sch. 1, Art. 5, Exemp. (a) — Agreement for sale of sugarcane crop with subsidiary covenants — exemption (a), whether applies.

Where the principal agreement embodied in a document is one for sale of sugarcane crop, and all the other covenants, which follow are of a subsidiary or auxiliary nature, and none of them is independent of the main agreement which it was the object of the parties to reduce into writing, the document is a simple agreement to sell the sugar cane crop, and falls under Exemption (a), Art 5 Sch I, Stamp Act (*Niamatullah, Harris & Rachhpal Singh, JJ.*)

STAMP REFERENCE BY BOARD OF REVENUE UNDER SEC. 57, STAMP ACT.

1936 A.L.J. 1185 = 1936 A.W.R. 1144 = 163 I.C. 614 = A.I.R. 1936 All. 461

Sch. 1, Arts. 5 & 15 — Agreement to sell agricultural produce — delivery merely

Stamp Act—(Contd.)

ancillary to obligation to sell—Stamp duty payable.

Where delivery of grain or other agricultural produce is incidental or merely ancillary to the obligation to sell or other agricultural produce, such agreement is not a mere bond, but an agreement to sell goods, and the case falls not under Art. 5 so as to attract the application of Exemption (a). (*Niamatullah, Harries & Rachhpal Singh JJ.*)

STAMP REFERENCE BY BOARD OF REVENUE UNDER SEC. 57, STAMP ACT.

1936 A.L.J. 1185 = 1936 A.I.R. 1144 = 163 I.C. 614 = A.I.R. 1936 All. 481.

Sch. I Arts. 5 & 31—*Two documents excluded by seller and purchaser described as receipts—Price paid in part and balance payable by instalments—Document, if constitutes a deed of exchange.*

Two documents were executed—one by A and the other by B. The one executed by A recited that he purchased a motor lorry from B for Rs. 4,200 giving two old lorries valued at Rs. 2,000 in exchange and Rs. 500 in cash and that he would pay the remaining Rs. 1,700 in 12 monthly instalments. The documents executed by B recited that he had sold a new motor lorry to A and had received Rs. 500 in cash and 2 old lorries priced at Rs. 2,000 which had been set off against the sum of Rs. 4,200 payable by A and the balance would be payable in 12 equal monthly instalments. Both documents were styled "Receipts" and bore one-anna stamp each. *Held*, that the two documents were memoranda of an agreement relating to sale of goods and as such fell within Exemption (a) to Art. 5, Schedule 1, Stamp Act; the two documents read together did not amount to deed of exchange under Art. 31 of the Act. (*Niamatullah JJ.*)

IMAM BAKSH vs. EMPEROR.

1936 A.L.J. 368 = 1936 A.W.R. 473 = 162 I.C. 504(2)

Sch. 1, Art. 15—*Scope and applicability—document both a bond and an agreement for sale of goods—Art. 15, if applies,*

Stamp Act—(Contd.)

Art. 15, Sch. I, Stamp Act. is a residuary Article applying only to such bonds as are not separately provided for in other Articles. Where a document fills a dual character and can be regarded both as a bond and an agreement for or relating to the sale of goods or merchandise exclusively, Art. 15, does not apply, as *ex-hypothesi* it can apply only if such an agreement is not specifically provided for and as Art. 5 expressly deals with agreements of this description, the operation of Art. 15 is excluded. (*Niamatullah Harries & Rachhpal Singh JJ.*)

STAMP REFERENCE BY BOARD OF REVENUE UNDER SEC. 57, STAMP ACT.

1936 A.L.J. 1185 = 1936 A.W.R. 1144 = 163 I.C. 614 = A.I.R. 1936 All. 481.

Sch. I, Arts 40 & 57—*Security bond by surety in favour of the judge for due performance of decree stamp duty payable, if under Art. 40 & Art. 57.*

A security bond under Or. 41, r. 5 of the C. P. Code executed by the surety mortgaging properties in favour of the judge for the due performance of the decree is chargeable with stamp under Art. 40 and not under Art. 57 of the Stamp Act. Such a security bond is a mortgage deed within the meaning of Sec. 2' of (17) of that Act. 52 All. 844, followed. (*D. N. Mitter & B. C. Mitter JJ.*)

AKSHAY ZAMINDARY, LTD., vs RAMANATH BURMAN.

40 C.W.N. 1281

Sch. I, Art 57—*Security bond under Sec. 21 of the Provincial Insolvency Act—Stamp duty leviable.*

A security bond under the provisions of Sec. 21 of the Provincial Insolvency Act is a bond executed to secure the due performance of a contract made by the insolvent to appear, and the surety to produce him in Court. Such a bond is therefore governed by Art. 57 of Sch. I of the Stamp Act and is leviable with the stamp duty prescribed

Stamp Act—(Contd.)

in that Article. (*Addison, Jai Lal & Abdul Raschid JJ*)

STAMP DUTY ON SECURITY BOARD
EXECUTED BY MURAD ALI, IN THE MATTER OF.

17 Lah. 74=38 P.L.R. 469=160 I.C.
276=A.I.R. 1936 All. 45

Sch. I, Art. 57, exemption (e)—
Security bond by supurdhar holding property attached by Court amin, if exempt from stamp duty.

Certain movable property attached by the *amin* in execution of a money decree was handed over to a *supurdhar* who executed a document undertaking to produce the document whenever demanded by the court and declaring that in case of failure, the court could realise the value from his person and property. On the question having arisen as to whether the document was required to be stamped, *held*, that the *supurdhar* was in the position of a surety for the *amin*, and the document executed by a surety for an officer of Government and was exempted from stamp duty under Art. 57, exemption (e) of the Stamp Act. (*Sulaiman C. J. & Bennet J.*)

REFERENCE UNDER THE CIVIL PROCEDURE CODE.

57 All. 883

SUCCESSION ACT (XXXIX OF 1925)

Sec. 63—Attesting witness merely affixing his mark to the will—Will if validly attested.

A will is validly attested within the meaning of Sec. 63, Succession Act, if either of the two necessary attesting witnesses has merely affixed his mark to the will. (*Thom, Niamatullah & Rachhpal Singh JJ.*)

MAIKOO LAL vs. SANTOO.

1936 A.L.J. 782=1936 A.W.R. 563=
A.I.R. 1936 All. 576=164 I.C. 298

Sec. 87—Intention of testator—departure from, how far justified.

Although under Sec. 87 of the Succession Act effect is to be given to the intention of the test-

Succession Act—(Contd.)

ator as far as possible, even if it cannot take effect to the full extent, still where the intention to create an estate of inheritance not permitted by the ordinary law is clear and there is no trace of an intention to create any other kind of estate, effect cannot be given to the scheme of succession so far as it concerns the persons entitled to take under the scheme who are also the persons who would take under the Hindu Law of Succession. (*Lord Thankerton.*)

GANESH CHUNDER DHUR vs. LAL BEHARY DHAR.

41 1 C.W.N.=1936 O.W.N. 822=
38 Bom. L.R. 1250=17 Pat. L.T.
801=A.I.R. 1936 P.C. 318=71 M.L.
J. 740 (P.C.)=164 I.C. 347

Secs. 211 & 326—Executor's liability for rents of premises demised to deceased lessee.

Executors of a deceased lessee who have not entered into possession are nevertheless liable for the rent to the extent of any assets of the testator which may have come into their hands. As for an executor, who has entered upon demised premises, he, over and above his liability in his representative capacity, is also personally liable for the rent; the lessee has then an option to sue him in either capacity. (*McNair, J.*)

KAMESWAR SINGH vs. FEROZE SHAH MERWANJI.

40 C.W.N. 390=165 I.C. 121

Sec. 214—Person obtaining property by survivorship, if must obtain succession certificate.

Sec. 214, Succession Act applies only when a person claims to the goods of a deceased person. The Section has no application where a person obtains property not as heir of a deceased but as a person entitled to succeed by survivorship. (*Henderson J.*)

SHEETAL CHANDRA DATTA vs. LAKSHMIMANEE DASSI.

63 Cal. 15,

Sec. 255—Jurisdiction of the probate Court to go into the question of validity of a will.

Succession Act—(Contd.)

The probate Court is concerned only with the question of the execution of a will and it has no jurisdiction to go into the question of the validity of the provisions of a will with reference to Hindu Law under Sec. 255, Succession Act. (*Bhide J.*)

MST. LASO DEVI vs. MST. JAGTAMBHA DEVI.

38 P.L.R. 803 = 163 I.C. 656 = A.I.R. 1936 Lah. 378

Sec. 263—*Probate granted without citing necessary parties—Such parties if may apply for recalling probate.*

Where the grant of a probate is made without citing persons who ought to have been cited, it is competent for such persons to apply to the Court for recalling the probate granted in their absence and and for calling upon to executor the prove the Will. 55 1. A. 18 & 33 Cal. 116 relied on. (*Page C. J. & Mya Cu J.*)

A. B. NEOGI vs. B. B. NEOGI.

14 Rang. 146 = A.I.R. 1936 Rang. 105 = 161 I.C. 629

Sec. 273—*Evidentiary value of a probate.*

A probate is conclusive as to the representative title of the executors and also as to validity of the contents of the Will. It is however not conclusive as to any collateral matter, it is not strictly even *prima facie* evidence of death and it certainly does not prove that the testator owned the property of which he purported to dispose. 6 Cal. 460 & 34 Bom. 599 followed. (*Mosely J.*)

K. M. S. N. N. CHETTIAR FIRM vs. KULSUM BIBI.

A.I.R. 1936 Rang. 103 = 161 I.C. 649

Sec. 299—*Order under the section, nature of—order, if appealable.*

An order assigning a bond passed by a District Judge under Sec. 299, Succession Act. should not be considered to

Succession Act—(Contd.)

be of a purely formal or interlocutory nature so as to exclude a right of appeal. Such an order is in some respect similar to an order passed under Sec. 145, C. P. Code and since an order under that section is appealable, it is reasonable to hold that an order under Sec. 299, Succession Act is also appealable. (*Bhide J.*)

HARI BAKSHI vs. SHAM SUNDAR.

A.I.R. 1936 Lah. 684.

Sec. 306—*Breach of a quasi contract—Death of a party—Liability if survives.*

A remedy for the wrongful act which was not a mere tort but a breach of a quasi—contract done by a deceased person can be pursued against his legal representative where property belonging to another person has been appropriated by the deceased and added to his estate—such action is not one excluded by Sec. 306, Succession Act, 17 C. W. N. 5 referred to. (*Coldstream & Jailal, JJ.*)

PEOPLE'S BANK OF NORTHERN INDIA LTD. vs. HARGOPAL.

17 Lah. 262 = 38 P.L.R. 526 = 162 I.C. 204 = A.I.R. 1936 Lah. 268

SUITS VALUATION ACT (VIII OF 1887)

Sec. 4—*Suit to set aside decree declaring annual maintenance charge upon property—Value of Suit, how determined.*

A suit for setting aside a decree declaring an annual maintenance to be a charge upon a certain property, the value of subject matter of the suit should be deemed to be ten times the amount claimed as payable as maintenance for one year. (*King, C. J. Nanavutty JJ.*)

RANK OF UPPER INDIA vs. ABDUL ALI & ANR.

1936 O.W.N. 522 = A.I.R. 1936 Oudh. 317 = 162 I.C. 750

Sec. 8—*Suit for recovery of mortgage bond with an endorsement of full satisfaction—valuation for purposes of jurisdiction.*

Suits Valuation Act—(Contd.)

A suit by a mortgagor for recovery of a mortgage bond with an endorsement of full satisfaction must be valued for purposes of jurisdiction at the same amount as is taken for the purpose of assessing court-fees. That is to say, the sum borrowed on the mortgage bond should determine the value of the suit. (*R. C. Miller J.*)

MUHAMMAD ISHAK MIYA CHOWDHURY vs. ANANDA CH. SAHA.

63 Cal. 657.

TEA CONTROL ACT (XXIV OF 1933)

Secs 12 & 15—*Mortgage of tea estate with legal incidents thereof, if includes the right to obtain a quota.*

A right to obtain a quota is a legal incident of the ownership of a tea estate and a mortgage of the tea estate together with the "legal incidents thereof" brings the right to the tea export quota within the ambit of the mortgage, even though the transaction was prior to the passing of the Tea Control Act. 39 C. W. N. 1261 distinguished. (*Panckridge J.*)

RAMCHAND DULICHAND vs. SARASWATIPUR TEA CO., LTD.

40 C.W.N. 1199

TORT

Assault.—*Grave and serious assault—nature of damages that can be awarded.*

In case of an assault of a grave and serious nature, the plaintiff is entitled to ordinary damages in any event, if the circumstances justify vindictive damages, he is also entitled to get such damages, unless the defendant proves facts which justify mitigation of the vindictive damages. Where however the damages quite apart from the principle of applying vindictive damages are substantial those damages cannot be mitigated. The defendant can of course allege facts which would constitute a defence and would result in the plaintiff's getting no damages at all, if sustained. But such allegations would amount to allegations in bar of the right

Tort—(Contd)

of action and cannot be relied upon in mitigation. (*Stone C. J. & Nyogi J.*)

ABDUL GHAFFAR KHAN vs. GOKUL FROSAD.

I.L.R. 1936 Nag. 1=165 I.C. 540=
A.I.R. 1936 Nag 231

Defamation—"privileged occasion,"—*meaning of.*

A privileged occasion, is, in reference to qualified privilege an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is so made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential. (*Dunkley J.*)

MA SEIN TIN vs U. KYAN MAUNG.

A.I.R. 1936 Rang. 332=164 I.C. 385

Defamation—*Statement in petition to Deputy Commissioner containing libel—suit for damages on such statement—plea of qualified privilege when may be taken.*

The plaintiff sued for damages for libel made in two petitions addressed to the Deputy Commissioner and the manager, Court of Wards. At the appeal, the defendants pleaded qualified privilege. *Held*, the plea could not allowed, as in that case the plaintiff would not get an opportunity of proving that the defendant had not used the occasion of qualified privilege in a proper way. (*Wort J.*)

BHAIRO MAHTO vs. RAJKISSEN SINGH.

17 P.L.T 816=A.I.R. 1936 Pat. 309
=162 I.C. 809.

Defamation—*Suit after conviction in criminal court—discretion in granting damages and costs.*

Where a person first prosecutes the defendant for defamation in the criminal court where he is convicted and afterwards sues him for damages, the action of the plaintiff in pursuing both remedies can be taken into consideration in awarding damages, and also justifies the Court in awarding propor-

Tort—(Contd.)

tionate costs where the claim is not decreed in full. (*Dunkely J.*)

MA SEIN TIN vs. U. KYAW MAUNG.

A. R. 1936 Rang. 332 = 164 I.C. 385.

Malicious prosecution—Onus of proving.

In cases of malicious prosecution, it is always for the plaintiff to establish affirmatively, *inter alia*, that the prosecution was brought without reasonable and probable cause. If the plaintiff fails to establish this the case must be dismissed even if not evidence is called on behalf of the defendants. (*Harris, J.*)

BASDEO vs. SHYAM CHARAN.

1936 A.L.J. 803 = 1936 A.W.R. 645 = A.I.R. 1936 All. 532 = 164 I.C. 184.

Malicious prosecution—Absence of reasonable and proper cause, if justifies dismissal of suit.

Where in a suit for malicious prosecution it is not positively shown that the defendant had any reasonable and proper cause for making complaint which led to the criminal prosecution, the suit should be dismissed. (*Niamatullah & Allsop JJ.*)

PANNAR vs. KHUNNU.

1936 A.W.R. 269 = 1936 A.L.J. 256 = 64 I.C. 669.

Malicious Prosecution—Suit for damages—plaintiff to prove malice and absence of reasonable and probable cause.

In a suit for damages for malicious prosecution, the malice necessary to be established is not malice in law but malice in fact, "*malus animus*" indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improbable motive. He must also show an absence of reasonable and probable cause which can be defined as an honest belief in the guilt of the accused founded upon the existence of a state of circumstances, which circumstances assuming to be true, would lead any ordinary prudent and cautious man placed in the position of accuser to the

Tort—(Contd.)

conclusion that the person charged was probably guilty of the crime imputed. (*Leach J.*)

E. S. E. MORDECAI vs. N. S. EZEKIEL.

A.I.R. 1936 Rang. 7 = 161 I.C. 617.

Malicious Prosecution Judgment entering acquittal, in favour of plaintiff, if debars defendant from proving that charge was in fact true.

In a suit for malicious prosecution, the judgment entering an acquittal in favour of plaintiff cannot be pleaded as a bar which would prevent the defendant from proving that the charge made by him against the plaintiff in the criminal case was in fact true, and on that ground the plaintiff was not entitled to recover damages. 50 All. 713 & 56 Mad. 641 relied on. (*Harris & Rachhpal Singh, JJ.*)

CHATURBHUI vs. MAUJI RAM.

1936 A.W.R. 231 = 1936 A.L.J. 594 = 163 I.C. 984 (2) = A.I.R. 1936 All. 537.

Malicious Prosecution—Conviction by first Criminal Court—Acquittal in appeal—judgment of trial court if can be pleaded as a bar to the suit for damages.

In a suit for malicious prosecution, the judgment of conviction passed by the first Criminal Court which is subsequently reversed in appeal cannot be pleaded as a bar to the suit. 21 All. 26 not followed; 50 All. 713 relied on. (*Harris & Rachhpal Singh JJ.*)

CHATURBHUI SAH vs. MAUJI RAM.

1936 A.L.J. 594 = 1936 A.W.R. 231 = A.I.R. 1936 All. 537 163 I.C. 938.

Negligence—Duty of a person driving a motor car,

A person who drives a motor car along the road is under the obligation to keep a careful look-out so that he may avoid pedestrians. Pedestrians also no doubt are under an obligation to keep a look-out for vehicles, but where there is no question of contributory negligence, the driver of the car must be made liable for damages for

Tort—(Contd.)

any accident that may have occurred.
(*Burn & Menon JJ.*)

J. K. RAU vs. S. M. DAVEY.

A.I.R. 1936 Mad. 195=161 I.C. 934.

Negligence—Collision between two vessels—Contributory negligence of one of the vessels—Effect of.

Although the plaintiff in an action for damages for a collision caused by the negligence to the defendant may be guilty of negligence or want of ordinary care which contributed to the accident, yet the plaintiff, when it is shown that there was prima-facie negligence on his part, will not be excused unless he can show that he could not have averted the collision by the exercise of ordinary care and diligence.

RIVER STEAM NAVIGATION CO. LTD.
vs. FIRM OF LATE RAM KANAI MADHAB
CH. RAUL.

40 C.W.N. 633=161 I.C. 994=A.I.R.
1936 Cal. 152.

Negligence—Damage caused by gas escaping from pipes—Liability of gas Company.

A company acting under statutory powers carrying in their mains inflammable and explosive gas are prima-facie within the principle that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come within the rule of strict liability if the gas escapes. The gas constitutes an extraordinary danger created by the company for their own purposes and they act at their peril and must pay for damage caused by the gas if it escapes even without negligence on their part. (*Lord Wright.*)

NORTH-WESTERN UTILITIES LTD. vs.
LONDON GUARANTEE & ACCIDENT COM-
PANY LTD.

1936 A.W.R. 397=1936 A.L.J. 171=
43 M.L.W. 163=159 I.C. 703=A.I.R.
1936 P.C. 27.

Negligence—Suit for damages against a doctor for negligently giving a quinine injection and thereby permanently laming the plaintiff.

Tort—(Contd.)

The plaintiff claimed damages against a doctor on the ground that the latter in giving him a quinine injection travelled beyond the safe area for injection, and the quinine injured the plaintiff's sciatic nerve with the result that he was permanently lamed. It was proved that immediately after the operation, the plaintiff found that he had foot drop and he had to cling to the doctor for support. He had no such symptoms before injection was administered and the trial judge inferred that the injection contributed to, if it had not caused foot drop. The doctor's theory was that the plaintiff was suffering before the injection from latent alcoholic Neuritis and that the alcoholic toxin in his system were lit up and precipitated by the shock of the injection. *Held*, that on the evidence, expert or otherwise, the trial judge had acted rightly in decreasing the claim. (*Lord Atkes.*)

ANTONIO DIAS CALDEIRA vs. FRED-
ERICK AUGUSTUS GREY.

1936 A.L.J. 638=1936 A.W.R. 606=
1936 M.W.N. 432=162 I.C. 426=A.I.
R. 1936 P.C. 154 (P.C.)

Nuisance—Act authorised by statute causing nuisance—action for such act when barred.

Whenever an act, otherwise unlawful and actionable, is expressly authorised by the Legislature, no action would lie against the person who has the statutory authority to do the act, provided it is done without negligence. The indemnity extends not only to the act itself, but to all necessary consequences or inevitable results, the test of inevitability being the impossibility of avoiding it by the exercise of due care and skill. But these principles of exemption are applicable only when the statutory authority is absolute and not conditional. Where the authority is conditional, the authorised person doing the act is not exempt from liability, if nuisance results from the act, although nuisance may be a necessary consequence. (*R. C. Mitter J.*)

NIRMAL CH. SANYAL vs. MUNICIPAL
COMMISSIONERS OF PATNA TOWN.

40 C.W.N. 1353=A.I.R. 1936 Cal.
707.

Tort—(Contd.)

Nuisance—*Branches of trees overhanging on another's land, if can be cut off.*

If the branches of a tree growing on one's land overhang on the land of another and thereby cause nuisance, the latter is entitled to lop off those branches. This right is described as the abatement of nuisance. 43 Bom. 164 & 31 Cal. 944 followed. (*Agha Haider J.*)

GOKAL vs. HAMIRA.

A.I.R. 1936 Lah. 134 = 161 I.C. 705

Seduction—*Defendant enticing away plaintiff's wife—Suit for damages, if maintainable.*

Where the plaintiff brought a suit for damages against the defendant on the ground that the latter had enticed away the wife of the plaintiff while the plaintiff was away from his home, and the plaintiff had been thereby greatly defamed and disgraced, had to suffer humiliation, and was put to worry and expense, *Held*, that the defendant committed an actionable wrong for which the plaintiff was entitled to recover damages. (*Sulaiman C. J. & Bennet J.*)

SOBHARAM vs. TIKARAM.

1936 A.L.J. 574 = 1836 A.W.R. 515 = 163 I.C. 974 = A.I.R. 1936 All. 454

Wrongful dismissal—*Liability of Secretary of State for wrongful dismissal and breach of contract to employ.*

No action against the Secretary of State lies either for damages for wrongful dismissal or for failure to carry out a contractual obligation to employ; and in this respect no distinction between servants who are employed to carry out the sovereign function and servant who are employed to carry out its trading function is possible. (*Panckridge J.*)

M. D'CRUZ & ORS. vs. SECRETARY OF STATE.

40 C.W.N. 865.

TRADE MARK.

Facts that must be proved by dealer seeking to restrain another from using his name or trademark.

Trade Mark—(Contd.)

Before a dealer can restrain another from using a name or mark, it is not sufficient to show that the article with that name or mark has acquired a reputation in the market, but, it must also be shown that the public have grown to associate that particular name or mark with himself as the manufacturer or dealer in that article. Where there is absolutely no evidence to establish any such association in the public mind between the plaintiff's business and the goods bearing the mark in question, the suit cannot succeed. 53 Mad. 402 & 25 Bom 433 followed. (*Varadachariar J.*)

BATCHAYI ROWTHAR vs. RAMASWAMI PILLAI.

A.I.R. 1936 Mad 8 = 160 I.C. 428

TRADE UNIONS ACT (XVI OF 1926).

Secs. 8 & 11—*Appeal to High Court, if should come before a Judge sitting on the Original Side.*

The provisions of Sub-Sec. (3) of Sec. 11 of the Trade Unions Act indicate that where there is an appeal to the High Court, it should come up before a Judge sitting on the original side of the Court which is to deal with the matter, if necessary, in the same way, as if it were trying a suit under the provisions of the Code of Civil Procedure. (*Derbyshire C. J. & Cossetto J.*)

INLAND STEAM NAVIGATION WORKERS UNION, IN RE.

63 Cal. 565 = 40 C.W.N. 97 = 62 C.L.J. 442 = 161 I.C. 378 = A.I.R. 1936 Cal. 57.

Secs 8 & 11—*Application to register a newly formed Trade Union—powers and duties of Registrar.*

When an application to register a newly formed Trade Union is made, the duty of the Registrar of Trade Unions is merely to examine the application and to look at the object for which the Union is being formed. If the objects are the objects set out in the Act, and if they do not go outside the objects prescribed in the Act, and if all the requirements of the Act and the regulations

Trade Unions Act—(Contd.)

made therein are complied with, the Registrar has no other option but to register the Union. (*Derbyshire C. J. & Costello J.*)

INLAND STEAM NAVIGATION WORKERS UNION, IN RE.

Cal. 565 = 40 C.W.N. 97 = 62 C.L.J. 442 = 161 I.C. 378 = A.I.R. 1936 Cal. 57.

TRANSFER OF PROPERTY ACT (IV OF 1882.)

Secs. 1 & 6 (d)—*Provisions of the Act, how far applicable in the Punjab.*

Though it is true that the Transfer of Property Act does not strictly speaking apply to the Punjab, the general principles of the Act which are mostly based upon the judgments of Equity Courts are always invoked in and by the Courts in the Punjab. The principles of Sec. 6 (d) which bars the transfer of a "right to future maintenance" would be applicable in the Punjab. (*Agha Haidar, J.*)

TARA CHAND vs. BAKSHI SHER SINGH.

33 P.L.R. 702 = A.I.R. 1936 Lah. 944.

Sec. 3—*Palm and date trees, if can be said to be immovable property.*

Palm and date trees, the produce of which can be got, and hence such trees can be considered to be timber, and are therefore immovable property. 90 I. C. 769 relied on. (*Wort, J.*)

MOTI SINGH vs. DEOKI SINGH.

A.I.R. 1936 Pat. 66 = 160 I.C. 1054 = 17 Pat. L.T. 170.

Sec. 3 - And Registration Act Sec. 2 (6)—*Right to receive future rents and profits of immovable property, if immovable property.*

A right under a deed of settlement to receive rents and profits of immovable property, even though such income may have to be received from the hands of trustees, is immovable property within the

Transfer of Property Act—(Contd.)

meaning of the Transfer of Property Act and Registration Act in so far as the right relates to future rents and profits. An assignment of such a right would be governed by the provisions contained in the said Acts as to transfers of immovable property. But rents and profits which, at the time of the assignment, have already been received by the trustees, of the settlement (or even have accrued) are not immovable property. (*Sir George Rankin.*)

M. E. MOOLLA SONS, LTD., vs. OFFICIAL ASSIGNEE, RANGOON HIGH COURT.

49 C.W.N. 1253 = 77 M.L.J. 440 = 17 P.L.T. 653 = 1936 A.W.R. 809.

Sec. 3—*Document executed by Purdasha lady sitting behind thin curtain—Witnesses attesting the document—Attestation, if proved.*

If a document executed by a purdasha lady is attested by witnesses while she is sitting behind a thin curtain and if she had been minded to see the witness sign she could have done so, even if she did not actually see them from the curtain due attestation to satisfy the terms of Sec. 3, T. P. Act is proved.

KUNDAN LAL vs. MT. MUSHARRAFI BEGUM.

63 I.A. 326 = 40 C.W.N. 1093 = 71 M. L.J. 151 = A.I.R. 1936 P.C. 207 = 1936 A.W.R. 736 = 63 C.L.J. 501 = 163 I.C. 156 = 38 Bom. L.R. 783 = 1936 A.L.J. 810 = 1936 M.W.N. 797 = 1936 O.W.N. 611.

Secs. 3, 6 (c) & 130—*Mortgagor executing mortgage and putting mortgagee in possession but mortgagee not paying the consideration. Right to recover consideration, if transferable.*

Where the mortgagor completes his part of the contract by executing the mortgage by putting the mortgagee in possession, but the mortgagee fails to perform his part of the contract by paying the consideration money the mortgagor has a transferable claim and can assign his right to recover the consideration. A suit by the assignee for the recovery

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of the amount would be maintainable. (*Bhide & Currie JJ.*)

SARDAR KHAN vs. HINDU JOINT FAMILY FIRM RAM MAL BARKAT SHAH.

A.I.R. 1936 Lah. 147 = 162 I.C. 698.

Sec. 6 (a)—Right to receive offerings made at a temple, if transferable.

A right to receive offerings made at a temple is a definite and fixed right and does not depend on any possibility of the nature referred to in Sec. 6 (a), T. P. Act, and such a right therefore is validly transferable, where there is nothing to show that the right is attached to any priestly office, or is dependant on the performance of any service of a personal character. (*Srivastava (A. C. J. & Smith J.)*)

BHAGWAN DEEN vs. BILLESUR.

1936 O.W.N. 845 = 164 I.C. 1111

Secs. 39 & 100—Charge for maintenance created by decree of Court, if enforceable against subsequent bonafide transferee of the property charged.

A charge for maintenance created by a decree of Court on certain property is enforceable against a subsequent bonafide transferee of that property, Sec. 39, T. P. Act which protects a bonafide transferee for consideration, cannot in terms apply to a case of a charge declared by a decree of Court. Nor does Sec. 40, T. P. Act apply to the case. (*Niyogi A. J. C.*)

MST. MAINA vs. AHSAN HUSSAIN.

19 N.L.J. 254

Secs. 41—Words "with consent"—significance.

The words "with the consent express or implied in Sec. 41 do not govern the word "transfer" but have reference to the real owner allowing the transferee to hold himself out as an ostensible owner of the property. (*Tek Chand J.*)

JESA RAM & ORS. vs. GHULAMAN & ANR.

A.I.R. 1936 Lah. 816.

Transfer of Property Act—(Contd.)

Sec. 41—Transferee, when can obtain valid title against real owner.

Where an ostensible owner transfers property, the purchaser, in order to obtain a valid title as against the real owner, must establish not only good faith and passing of consideration, but must further establish that he made reasonable enquiries as to the title of the transferor. An entry in the revenue papers itself is not sufficient to constitute the basis of enquiries. (*Vivian Bose J.*)

KHWAJA AFSAL vs. MOHAMMED SAHEB.

I.L.R. 1936 Nag. 177 = A.I.R. 1936 Nag. 214 = 165 I.C. 177

Sec. 41—Wife allowing husband to deal with her property as ostensible owner, if estopped from challenging the right of a person to whom the property has been transferred by her husband.

If a wife allows her husband to deal with her property as the ostensible owner she will be estopped from challenging the title of a person to whom the property has been transferred by her husband. (*Bhide JJ.*)

MANKAUR vs. GURBUX SINGH.

38 P.L.R. 90.

Sec. 43—Scope and applicability of.

In order that Sec. 43 of the T. P. Act may apply, it is essential that there should be a finding that the transferee had believed in and acted upon some erroneous misrepresentation. (*King C. J. & Zia-Ul-Hassan J.*)

WALIUDDIN AHMED vs. RAM RAKHAN SINGH.

1936 O.W.N. 483 = 162 I.C. 451 = A.I.R. 1936 Oudh 313.

Sec. 43—Application of the Section.

Where the parties to a sale know perfectly well with whom the immediate title in the property rested and there is

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no evidence of any erroneous representation or inducement, Sec. 43 of the T. P. Act can have no application. (*Bajpai J.*)

MST. MAINA vs. BHAGWATI PRASAD.

1936 A.L.J. 1230 = 1936 A.W.R. 691 =
A.I.R. 1936 All. 557 = 164 I.C. 193.

Sec. 51—Improvements made by permanent lessee—when compensation payable.

There is no valid reason for excluding a permanent lessee from the benefit of Sec. 51, T. P. Act. So long as he pays the rent due on his lease, the lessee can certainly consider himself to be the absolute owner of the land perpetually leased to him and he can erect a construction upon it and thereby improve the value of the land. The phrase, believing in good faith that he is absolutely entitled implies that the transferee must not be aware of any circumstances which would render invalid his transfer. The transferee must not be a trespasser or a qualified holder. (*Nanavutty J.*)

HAR NARAIN vs. SIDHI NATH.

1936 O.W.N. 385 = 161 I.C. 834.

Sec. 52—Sale during proceedings of ejectment—doctrine of lis pendens, if applies.

Where during the pendency of proceedings for ejectment the property is sold, the principle of lis pendens laid down in Sec. 52, T. P. Act, will apply to it no matter whether the sale was voluntary or not. 34 P.L.R. 462 and 34 P. L. R. 531 relied on. (*Bhide J.*)

GOPAL SINGH vs. RAO BALDEV SINGH.

A.I.R. 1936 Lah. 512 = 165 I.C. 833.

Sec. 52—Mortgagor granting permanent leases of mortgaged land during pendency of mortgage decree for execution—large sums taken as nazrana—leases not referred to in proclamation of sale—Auction purchaser, if can avoid lease.

Where during the pendency of a mortgage decree for execution, the mortgagor

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grants a large number of permanent leases of mortgaged lands on receipt of substantial nazarana, but in the proclamation of sale under which the properties are ultimately sold at auction. These leases are not referred to all in the sale proclamation and the auction purchaser is not bound by these leases and can avoid them under Sec. 52, T. P. Act. (*Sulaman C. J. & Bajpai J.*)

JAMOON vs. CHAKRADHAR JAYAL.

1936 A.W.R. 1035 = 1936 A.L.J. 1277.

Sec. 53—Husband transferring property to wife in lieu of dower debt—preference over other creditors—transfer, if invalid.

Where a husband transfers property to his wife in lieu of dower debt and thereby gives preference to the debt due to his wife over the debts due to other persons, there is nothing objectionable in the course adopted him. (*Niamatullah & Rachhpal Singh.*)

KULSUM BIBI vs. SHYAM SUNDER JAL.

1936 A.W.R. 797 = 1936 A.L.J. 1027 =
A.I.R. 1936 All. 690 = 164 I.C. 515.

Sec. 43—Mohamedan husband transferring property to his wife in lieu of dower debt—preference over other creditors—transaction, if genuine, cannot be impeached under Sec. 53.

Where a Mahamedan husband, who is heavily indebted to other persons transfers property to his wife in lieu of her prompt dower debt, and the transaction is found to be a genuine and bonafide one, it cannot be impeached under Sec. 53, T. P. Act. Though the transaction may adversely affect the body of creditors by reason of the fact that one creditor, is preferred, that does not affect the validity of the transfer. 12 Pat. 297 followed. (*Harries & Ganganath JJ.*)

RAMESHWAR NATH vs. ALTAB BEGAM & ORS.

1936 A.W.R. 870 = 1936 A.L.J. 966
= A.I.R. 1936 All. 803.

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Sec. 53—*Surrender by widow of her life estate, if can be challenged on the ground of fraud.*

The word "transfer" in Sec. 53, T.P. Act is wide enough to cover a surrender by a widow of her widow's interest. A deed of surrender of a widow's estate, if made with intent to defraud or delay the claims creditors amount of to a fraudulent transfer within the meaning of Sec. 53, T.P. Act, and is voidable under the Section. 33 Bom. 1 relied on. *Pollock J.*)

NILKANTHA LAXMAN vs MURTABAI.

I.L.R., 1936 Nag. 69 = A.I.R. 1936 Nag. 166 = 165 I.C. 944.

Sec. 53—*Fraudulent transfer—both transferor and transferee actuated by common intention to defraud creditors—Validity of the transfer.*

If in a transfer made with intent to defeat or delay creditors the transferor alone had that intention and the transferee did not share the intention, the transferee would be a transferee in good faith and for consideration and his right would not be impaired by anything contained in Sec. 53 T. P. Act. But if the transferor and the transferee are actuated by the common intention to defraud creditors, there is no good faith and the transfer will not stand even though full consideration had passed. (*Harris & Bajpai JJ.*)

SHAUKAT ALI vs. SHED GHULAM.

1936 A.W.R. 510 = 1936 A.L.J. 692 = 165 I.C. 124 = A.I.R. 1936 All 663.

Sec. 53 as amended in 1929—"Intent to defeat or delay creditors"—meaning of.

Prior to the amendment of Sec. 53, T. P. Act by the amending Act of 1929, the law was that where the effect of any transfer of immovable property was to defraud, defeat or delay the creditors and such transfer was made gratuitously the transfer was presumed to have been made with intent to defeat or delay the creditors. In view of the amendment the principle now established is that in such case the Court must

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look at the whole of the circumstances surrounding the transfer and then ask itself the question whether the transfer was in fact executed with the intent to defeat or delay creditors. The mere fact that the effect of the transfer was to defeat or delay the creditors and that it was made gratuitously, is not sufficient to hold that the transfer was made with "intent to defeat or delay the creditors". (*Addison & Abdul Rashid JJ.*)

TULSI RAM vs. THAKURDAS MADAN-MOHAN LAL.

38 P.L.R. 76 = 164 I.C. 933 = A.I.R. 1936 Lah. 933.

Sec. 53A—*Suit after the section come into force—transaction before the section came into force—section if applies.*

Where a suit is filed after the coming into operation of Sec. 53A, T. P. Act, the provision of the section govern the case, although the transaction in question had arisen before the coming into force of the section. (*Sulaiman C.J. & Bennett J.*)

SHYAM SUNDAR vs. DIN SHAH.

1936 A.W.R. 1038 = 1936 A.L.J. 1323.

Sec. 53A—*Doctrine of part performance—if applicable to an oral sale.*

The doctrine of part performance cannot override express provisions of the law such as are contained in the Transfer of Property and Registration Acts. An oral sale is expressly prohibited by Sec. 54 T. P. Act when the value of the property is over Rs. 100. Consequently the doctrine of part performance has no application. (*Vivian Bose J.*)

KRISHNABAI & ORS. vs. PARWATIBAI & ORS.

A.I.R. 1936 Nag. 282 = 165 I.C. 934.

Sec. 53A—*Doctrine of part performance—possession, if must be referable only to agreement.*

In order to invoke the doctrine of part performance as embodied in Sec. 53A T. P.

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Act, it is necessary that the possession relied upon as part performance of the agreement must be referable to the agreement only and not to anything else. In the absence of proof of such circumstance, the said doctrine cannot be availed of. (*Mukherjee & S. K. Ghosh JJ.*)

BAHADUR SINGH SINGHIE vs. RANI JYOTIRUPA DEVI.

40 C.W.N. 1176.

Sec. 53A—Mortgagee in possession leasing out property to mortgagor—Suit for ejectment—Mortgagor alleging transaction of lease to nominal—Doctrine of part performance, if can be invoked.

A mortgagee with possession leased out the mortgaged property to the mortgagor under a Rent Note. On his suing to eject the mortgagor on the expiry of the lease, the latter contended that the Rent Note executed was a nominal transaction and that he was in possession of the property ever since the date of the mortgage. Held, that Sec. 53A, T. P. Act governed the case and the mortgagee could not invoke the doctrine of part performance in his favour. (*Vivian Bose J.*)

MST. NASIBAN vs. MAHAMMAD SAYED.

19 N.L.J. 179 = A.I.R. 1936 Nag. 174 = 164 I.C. 557.

Sec. 54—Formal delivery of possession, if sufficient where vendee already in possession.

Where tangible immovable property sold is already in possession of the vendee, and the sale can only take place by delivery thereof, then it is not necessary that the vendee should leave the property and re-enter it under the title; a formal delivery of possession under such circumstances is sufficient. 60 Cal. 384, 20 C. W. N. 195 & 38 Mad. 1158 followed. (*Jai Lal J.*)

MAHBUB vs. KALE KHAN.

A.I.R. 1936 Lah. 756.

Sec. 54—"Reversion or other intangible thing," if covers any interest in immovable property which is not itself immovable property.

Sec. 54, T. P. Act, does not contain any such wide phrase as "any interest to or in immovable property," but the phrase "rever-

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sion or other intangible thing," covers every interest in immovable property which is not regarded (as e. g., an undivided share in land is regarded) as being tangible immovable property in itself. (*Sir George Rankin.*)

M. E. MOOLLA SONS, LTD., vs. OFFICIAL ASSIGNEE, RANGOON HIGH COURT.

63 I.A. 340 = 40 C.W.N. 1253 = 71 M.L.J. 440 = 17 P.L.I. 653 = 14 Rang. 400 = 1936 A.W.R. 809 = 1936 A.L.J. 832 = 38 Bom. L.R. 1011 = 44 M.L.W. 595 = A.I.R. 1936 P.C. 230.

Sec. 54—Assignment of a money decree, if must be by registered instrument.

A decree for money cannot be regarded as an immovable property and if it is to be regarded as an intangible thing, it is not an intangible thing of the class to which Sec. 54, T. P. Act, was intended to apply. The assignment of such a decree therefore does not require registration. (*Fazl Ali J.*)

THAKURJI MAHARAJ vs. DWARKA RAM.

17 P.A.T. 536.

Sec. 54 & 122—Sale and gift—transaction failing as sale may be good gift.

A transaction may have two characters. It may evidence a gift as well as a sale. If it fails as a sale it may nevertheless, be held to be a good gift, provided that all conditions necessary for making a valid gift are there. (*Niamatullah & Rakhpal Singh JJ.*)

KULSUM BIBI vs. SHYAM SUNDAR LAL.

1936 A.W.R. 787 = 1936 A.L.J. 1027 = A.I.R. 1936 All. 600 = 164 I.C. 515.

Sec. 55—Covenant guaranteeing non-existence of encumbrances—breach of the covenant—Indemnity, if implied.

A covenant guaranteeing the non-existence of encumbrances necessarily implies a condition to indemnify the purchaser in case any defect in the title is subsequently discovered. It is not legally necessary that there should be an express condition in the sale deed on the part of the seller to indemnify the purchaser in case of discovery of any defect in title later on. (*Jailal J.*)

IMAM DIN vs. BHAG SINGH.*

A.I.R. 1936 Lah. 746.

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Sec. 55(4) (b)—*Vendor's charge for purchase money unpaid and interest on it—rate of interest.*

Sec. 55, T. P. Act, allows a vendor a charge for purchase money unpaid and for interest on it, and he is entitled to receive interest under the section at the rate of one per cent per mensem. *Sulaiman C. J. & Bennet J.*)

SHIAM LAL vs. RAM SARUP.

1936 A.W.R. 885 = 165 I.C. 352 = 1936 A.L.J. 1081.

Sec. 58 (a) & (c)—*Transaction which constitutes an English mortgage, if affected by mortgagor undertaking to pay rates and taxes.*

Where the mortgaged property is conveyed absolutely to the mortgagee and the other features of an English mortgage are present, the fact that the mortgagor undertakes to pay the rates and taxes does not take away from the transaction its character of an English mortgage. (*R. C. Mitter J.*)

DAVID ELIAS DUCK COHEN vs. BAI-DYANATH MOOKERJI.

40 C.W.N. 1270 = A.I.R. 1936 Cal. 648

Sec. 58 (b)—*Validity of equitable sub-mortgage.*

A equitable sub-mortgage by a mere deposit of title deeds without a registered document can be validly made even of an equitable mortgage particularly when the original mortgage is by a registered deed. (*Ba U. J.*)

MAUNG THAUNG vs. M. M. K. CHE-TTYAR FIRM.

A.I.R. 1936 Rang. 386 = 164 I.C. 724.

Sec. 58 (c)—*mortgage by deposit of title deeds to cover present and future advances, if may be created—part of the money taken when deeds deposited—further advance at subsequent date on separate handnote—mortgage, if covers second loan.*

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Title deeds may be deposited under an oral agreement to cover present and future advances as each advance is made, it become a charge upon the property comprised in the title deeds from the force of the prior oral agreement. Consequently, when there is an agreement that a loan upto a certain maximum would be taken and that the deposit of title deeds would be security for the loan up to that amount, and under such agreement the title deeds are deposited and a smaller amount is taken, and later on a further sum within the stated maximum is taken and a separate handnote executed therefor, there is a mortgage by deposit of title deeds in respect of the second advance as well. (*Guha & Bartley JJ.*)

MOHINI MOHAN SAHA vs. DEB NARAIN SAMANTA.

40 C.W.N. 1277 = A.I.R. 1936 Cal. 412.

Secs. 58 & 100—*Difference between a mortgage and a charge—charge on property when becomes a mortgage.*

When a charge is created by an act of a party, the specification of the particular fund or property negatives all personal liability and the remedy of the holder of the charge is against the property charged only. When there is in addition a personal covenant, the security will become collateral to that personal covenant and the security would, in that case appear to become a transfer of a right of sale to support the personal covenant and as the right of sale is a right in rem, the transaction would be a mortgage. For this reason it may be said that the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage. (*Addison & Abdul Raschid JJ.*)

BENARES BANK LTD. vs. HAR PRAS-HAD.

38 P.L.R. 8 = 163 I.C. 69 = A.I.R. 1936 Lah. 482.

Sec 60—*Mortgage property containing several items—liability of each item for whole amount due.*

Under Sec' 60 of the T. P. Act, the integrity of the mortgage is not broken except where the mortgagee has purchased

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or otherwise acquired as proprietor a certain portion of the property mortgaged. So long as the integrity of a mortgage remains in tact, each item of the property mortgaged, where there are distinct and separate items, is liable for the whole amount due under the mortgage, and the mortgagee is entitled to place the whole of that liability upon one of the items of the mortgaged property. (*Thom & Raghpal Singh JJ*)

RAM CHAND vs. PARBHU DAYAL.

1936 A.W.R. 788 = A.I.R. 1936 All 595
= 184 I.C. 613 = 1936 A.L.J. 1116.

Sec. 60—Mortgagee acquiring a portion of the mortgaged property—other's if can claim redemption by payment of their quota only.

No doubt, it is true that a mortgage is indivisible and is spread over the entire mortgaged property, but there are certain exceptions to this rule and one of these exceptions is mentioned in Sec. 60 T. P. Act. When a mortgagee acquires a portion of the mortgagors interest in the mortgaged property, those who are interested in the remaining portion of it are entitled to claim redemption by payment of their quota only. (*Khoja Mohammed Noor & Rowland JJ.*)

MUNGA LAL vs. SAGAR MAL.

15 Pat. 481 = 17 P.L.T. 726 = A.I.R. 1936 Pat. 629.

Sec. 60—Person taking puisne mortgage of property with knowledge of prior mortgage. if can redeem upon payment of part mortgage debt.

Where a person elects to take a puisne mortgage of immovable property with the knowledge of the existence of a prior mortgage, his right to redeem the property subject to prior mortgage is according to Sec. 60, T. P. Act a right to redeem upon payment not of a part but of the whole of the mortgage debt. (*Page C. J. & Ba U J.*)

K. S. P. SUBBIAH NAIDU vs. RAM SABAD.

14 Rang. 198 = A.I.R. 1936 Rang. 266
= 163 I.C. 444.

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Sec. 61—Mortgage by several persons—further charge by some of them—Original mortgage, if redeemable.

A Zemindari share in a village was mortgaged by several persons. Subsequently two of the mortgagors executed two deeds of further charge on the above mortgaged property in favour of the mortgagee. The other mortgagors thereafter sought to redeem the original mortgage. Held, that they were entitled to do so for paying the money due on those deeds, and the rights in respect of the deeds of further charge were to be enforced by separate proceedings. (*King C. J. & Nanavutty, J.*)

KANAK SINGH vs. GAJRAJ SINGH.

1936 O.W.N. 239 = 163 I.C. 890 = A.I.R. 1936 Oudh 202

Secs. 63 & 70—Mortgage holding included by Government in its waste land—Such land, if constitutes accession to the mortgage.

Government waste lands adjoining mortgaged property which are brought under cultivation do not become subject to the mortgage, and in fact Secs. 63 and 70, T. P. Act, have no application to such extensions of cultivation which belong to the person who has brought the land under cultivation. (*Dunkley J.*)

S. R. M. M. C. T. FIRM vs. KO PO SINGH & ORS.

A.I.R. 1936 Rang. 127 = 162 I.C. 383

Secs. 65A & 66—Mortgagor leasing out mortgage land—security rendered insufficient—enforceability of lease against auction purchaser of mortgaged land.

A mortgagor executed a lease of his mortgage property in 1922 before the passing of the amendment Act. The case is therefore not governed by Sec. 65A, but by Sec 66. If it appears that the value of the mortgage property is impaired on account of the lease, it cannot be enforced against an auction pur-

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chaser of the mortgaged land. (*Zia-ul-Hassan J.*)

TELSI RAM vs. MAUNA KAUR.

1936 O.W.N. 399 = 162 I.C. 225.

Sec. 68—*Suit under circumstances mentioned in the section - mortgagee, if loses his right to proceed against security.*

By instituting a suit for mortgage money under the circumstances enumerated in Sec. 68, T. P. Act, a mortgagee does not lose his right to proceed against the security. It could not have been the intention of the legislature, that a mortgagor who by his own default brings about deterioration of the mortgaged property and forces the mortgagee to bring a suit for money, should thereby deprive the mortgagee of what little security he has. (*Khaja Mohammed Noor J.*)

JAMNA DAS BISASAR LAL vs. MANI HALWAI.

162 I.C. 15 = A.I.R. 1936 Pat. 431.

Sec. 68 (1) (c)—*Remedy of usufructuary mortgagee who is dispossessed of the mortgaged property by reason of a partition in which the property is allotted to another co-sharer.*

Where an usufructuary mortgagee is dispossessed of a part of the mortgaged property as a result of its being allotted to another co-sharer on partition and the mortgagor fails to show what property was allotted to him in lieu of the mortgaged property, the mortgagee is entitled to a money decree under Sec. 68 (c) of T. P. Act as it stood before the amendment made in 1929. (*Srivastava & Thomas, JJ.*)

NANO BAHADUR SINGH vs. SITARAM TEWARI.

1936 O.W.N. 21 = 160 I.C. 27(2) = A.I.R. 1936 Oudh 174

Sec. 69—*Provision of the section as amended by Act XX of 1929, if affects terms and conditions of English mortgage, executed before amendment, including term*

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as to appointing receiver introduced by Sec. 12 of the Trustees & Mortgagees' Powers Act.

Sec. 69A of the T. P. Act, introduced by Act XX of 1929, has not replaced or modified Sec. 12 of the Trustees and Mortgagees Powers Act and the only effect of the amendment is that the said Sec. 15 is not to be deemed to be incorporated in an English mortgage *pro prio rigore* executed after the amending Act came into force.

In the case of a mortgage executed before the amending Act, the terms and incidents thereof, including those introduced into the deed by virtue of Sec. 66 of the T. P. Act as then in force, among them being the term about the appointment of a receiver without recourse to Court, are not affected by the amendment of 1929 by which the last paragraph of the original section has been taken out of the statute. (*R. C. Mitter J.*)

DAVID ELIAS DUCK COHEN vs. BAIDYANATH MOOKHERJI & ORS.

40 C.W.N. 1270 = A.I.R. 1936 Cal. 646

Sec. 72—*Mortgagee paying land revenue in respect of mortgaged property—whether such money must be added to principal.*

A mortgagee is clearly entitled to pay the revenue and land taxes in respect of the mortgaged property to have the same from forfeiture and sale. Under Sec. 72 he may add the money so spent by him to the principal money of the mortgage, provided that the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property. But if he chooses not to add the money as such, he is debarred from suing to realise the money so spent independently of the mortgage. He may make his claim under Sec. 69 of the Contract Act. (*Mackney, J.*)

A. MURRAY M. S. M. FIRM.

A.I.R. 1936 Rang. 47 = 161 IC 626

Sec. 76 (c)—*Payment of Municipal Tax by mortgagee—whether such sum to be set off in mortgage account.*

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Where a mortgagee in possession pays municipal taxes, he is entitled to set off that amount in the mortgage account, so that he can remain in possession till liquidation of the sum so paid by him. (*Wort. J.*)

KESHORAM vs. RAM LAL SAHU.

A.I.R. 1936 Pat. 312 = 163 I.C. 55

Secs 76 & 77 *Principles of the section, if applicable to mortgages executed before the passing of the T. P. Act.*

The provisions of Secs. 76 & 77 T. P. Act, with regard to the liability of the mortgagee to account, being merely a codification of the law in existence, before the passing of the T. P. Act, the principles enunciated in those sections are applicable to the case of a usufructuary mortgage executed before the enactment of the Act. (*Courtney Terrel C. J. & Dhaule J.*)

MUHAMMED SADIQ vs. HARAKH NARAIN.

17 P.L.T. 684 = A.I.R. 1936 Pat. 583

Sec. 78 — "*Gross negligence*" *Meaning of.*

Gross negligence in Sec. 78 of the T. P. Act, means carelessness of so aggravated a nature as to amount to neglect of precautions which the ordinarily reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks. (*Mukerji & S. K. Ghosh JJ.*)

DHARANIMOHAN ROY vs. KUMAR PRAMATHA NATH ROY.

63 Cal. 880 = 40 C.W.N. 648 = 165 I.C. 382 = A.I.R. 1936 Cal. 283

Sec. 78 — *Priority—Document deposited with equitable mortgagee going back to the hands of the mortgagor and he producing the document and mortgaging property comprised therein to subsequent simple mortgagee—Priority.*

In order to find out whether a prior mortgagee would be postponed to a subsequent mortgagee, the test is that if the possession of the title deeds in an essential part of the earlier encumbrancer's security,

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then, if he having got the title deeds allows them by negligence to be again without sufficient reason, in the possession of the mortgagor, he will be postponed to a subsequent encumbrancer to whom they are delivered. (*Mukherjee & S. K. Ghosh JJ.*)

DHARANIMOHAN ROY vs. KUMAR PRAMATHA NATH ROY vs. & ANR.

63 Cal. 880 = 40 C.W.N. 648 = 165 I.C. 382 = A.I.R. 1936 Cal. 283

Sec. 81 — *Object of the section.*

The whole subject of Sec. 81, T. P. Act, is to enable a subsequent mortgagee to call upon the prior mortgagee to exercise his rights, so far as they can be satisfied, as against the properties which are not the subject matter of the subsequent mortgagee's charge. (*McNair J.*)

SM. ANNAPURNA ROY vs. RAM RANJAN MULLICK.

40 C.W.N. 1173

Sec. 81 — *Doctrine of marshalling of securities how far applies to moveable property.*

Sec. 81, T. P. Act, applies to mortgages of immovable property and not to the hypothecation of movables. Even if the principle of marshalling as set out in Sec. 81, be held to be applicable to movables, it can only be applied to funds standing upon an equal footing. It cannot under any circumstances be enforced so as to prejudice the rights of a prior mortgagee because the rights and obligations of a mortgagee of immovable property are not the same as those of a person to whom movables have been hypothecated and two securities do not stand on the same footing so as to allow the doctrine to be availed of. 9 Rang. 162 relied on. (*Page C. J. & Ba U. J.*)

K. S. P. SUBBIAH NAIDU vs. RAM SABAD.

14 Rang. 198 = A.I.R. 1936 Rang. 266 = 163 I.C. 444.

Sec. 81 — *Prior mortgagee, if has right to sell mortgage properties in any order he prefers.*

T. P. Act—(Contd.)

The words "but not so as to prejudice the rights of the prior mortgage" in Sec. 81 of the T. P. Act do not entitle the prior mortgagee to have the properties mortgaged to him to be sold in any order he may prefer. (*Mc Nair J.*)

SM. ANNAPURNA ROY vs. RAM RANJAN MULLICK.

40 C.W.N. 1173.

Sec. 82—*Right of mortgagor paying the whole of the mortgage debt to claim contribution from co-mortgagor.*

A person who owns a portion of the property covered by a mortgage can if he pays the whole of the mortgage debt for which the entire mortgaged property was liable, claim contribution from other persons who are owners of other portions of the mortgaged property. (*Srivastava & Thomas JJ.*)

PURBI DIN vs. HARDEO BUX SINGH.

1936 O.W.N. 44 = 159 I.C. 1049 = A.I.R. 1936 Oudh. 169

Sec. 91—*Holder of Zaripeshgi lease of mortgage property—if a person interested.*

The holder of a Zaripeshgi lease of mortgage property is a person interested in such property within the meaning of Sec. 91, T. P. Act. (*Zia-ul-Hassan J.*)

TULSI RAM vs. MUNNA KUAR.

1936 O.W.N. 399 = 162 I.C. 225.

Sec. 91 (f) (*before amendment of 1929*)—*suit for sale on mortgage—Attaching creditor not impleaded—Effect of nonjoinder where attaching creditor is assumed to be a necessary party.*

A creditor who had a simple money decree, attached the property of his debtor, which was subject to a mortgage. Subsequent to the attachment, the mortgagee brought a suit on the basis of the mortgage without impleading the attaching creditor and obtained a decree for sale. Held, on the assumption that, prior to the amendment of Sec. 91, T. P. Act, by Act XX of 1929, the attaching creditor was a necessary party

T. P. Act—(Contd.)

in a mortgage suit, that the result of such a misjoinder could not be fatal to the rights of the attaching creditor which was not liable to be affected by the decree in the mortgage suit. (*Bajpai J.*)

GOPAL DEBI vs. LACHMI SANKER,

1936 A.L.J. 705 = 163 I.C. 966 = 1936 A.W.R. 595 = A.I.R. 1936 All. 512.

Sec. 92—*Subrogation, right of—Nature of such right.*

Where a subsequent mortgage pays off a prior mortgage and acquires rights of subrogation under that mortgage, it cannot be said that this right should extend for a period of 12 years from the date of acquisition. Sec. 92, T. P. Act, limits him to the rights and powers of the mortgagee of that date. (*Sulaiman C. J. & Bennett J.*)

RAM SWARUP vs. SAHU BHAGVATI PRASAD.

1936 A.W.R. 516 = 1936 A.L.J. 586 = 164 I.C. 725 = A.I.R. 1936 All. 636.

Sec. 92—*Subrogation—Mortgagee having no interest, if can claim subrogation without agreement.*

The principle of the equitable doctrine of legal subrogation is that the person making the payment has some interest of his own to protect and that the payment is made for the protection of such interest. Where, however a mortgagee has no interest in the property to protect either in fact or in law at the time of payment of the decree of a prior mortgagee, and there is no agreement for subrogation, the claim passed on right of subrogation is untenable. (*Srivastava & Nanavutty JJ.*)

BHOLANATH vs. MAHRANI KUER.

1936 O.W.N. 489 = 162 I.C. 382 = A.I.R. 1936 Oudh. 280

Sec. 92—*Subrogation—Subsequent mortgagee redeeming prior mortgage—Right of subrogation—Application of 3rd paragraph of Sec. 92.*

The third paragraph of Sec. 92, T. P. Act relating to a registered instrument does

T. P. Act—(Contd.)

not apply to subsequent mortgagees. Accordingly, under the first paragraph of the section no subsequent mortgagee who redeems a prior mortgage has a right to be subrogated to the position of the prior mortgage, and it is not necessary that there should be a registered instrument by which the mortgagor should agree to such subrogation. (*Allsop & Ganaganath JJ.*)

GANGARAM vs. HARIHAR PRASAD.

1936 A.W.R. 274 = 1936 A.L.J. 281 =
162 I.C. 932 = A.I.R. 1936 All. 336

Sec. 92—*Subsequent mortgagee agreeing to pay prior incumbrances, paying off some of them only—claim of subrogation, if maintainable against undischarged incumbrances.*

A later mortgagee who undertakes to pay the prior incumbrances on the property, but actually pays only some of them, cannot resist the claim of the incumbrances not paid by him by setting up his discharge of the other incumbrances as a shield and claiming priority in respect of the incumbrances discharged by him. (*Cornish Varadachariar & Venkataramana Rao JJ.*)

LAKSMI AMMA vs. SANKARA NARAYAN MENON.

59 Mad. 359 = 70 M.L.J. 1 = 43 M.L.W.
23 = 1936 M.W.N. 30 = 70 M.L.J. 1 =
160 I.C. 137 = A.I.R. 1936 Mad. 171

Sec. 92 (1) & (3)—*Application of the clauses.*

Cl. (1) of Sec. 92 of the amended T. P. Act, applies to all persons who have an interest in the equity of redemption and an under no personal obligation to discharge prior incumbrances, and cl. (3) of the said section is intended to apply to all persons who acquire an interest in the mortgaged property by advancing moneys to discharge prior incumbrances. There is no warrant for restricting the scope of cl. (3) to persons other than purchasers of mortgagees. (*Cornish Varadachariar & Venkataramana Rao JJ.*)

LAKSHMI AMMA vs. SANKARA NARAYAN MENON.

59 Mad. 359 = 1936 M.W.N. 30 = 70
M.L.J. 1 = 160 I.C. 137 = A.I.R. 1936
Mad. 171

T. P. Act (Contd.)

Sec. 95—*Co-mortgagor's right to contribution.*

The right to claim contribution is under Sec. 65 of the old T. P. Act in the nature of a charge and not a right of subrogation. The right to enforce it accrues on the date of payment under Art. 132 of the Limitation Act and not the date of mortgage. 49 I.C. 416—9 L.W. 120 & A.I.R. 1932 All. 250 followed. (*Venkataramana Rao J.*)

SHEERAMULLU vs. RAMAKRISHNYA.

70 M.L.J. 582 = 1936 M.W.N. 266 =
162 I.C. 828 = A.I.R. 1936 Mad. 500

Sec. 106—*Tenancy of a house—Rent for broken period of month first paid—Date from which tenancy begins to run.*

Where a house is taken on hire in the middle of a month and the rent for the broken period of the month is first paid, the inference is that the parties intended that the tenancy should run according to the calendar month. The general practice also is that when a house is occupied in the middle of a month and is intended that the tenancy should be by the calendar month the rent is paid separately for the days during which the house is occupied prior to the 1st of the following calendar month and the tenancy is deemed to begin on the 1st of each subsequent calendar months. (*King C. J. & Zia-ul-Hassan, JJ.*)

RAMJI LAL vs. SECRETARY OF STATE.

1936 O.W.N. 514 = 162 I.C. 712 = A.I.
R. 1936 Oudh. 306

Sec. 107—*Lease for collection of rent provisions of T. P. Act, if applicable.*

A lease executed mainly with the object of making an agreement for collection of rents and not with the object of cultivation cannot be regarded as an agricultural lease, and is therefore subject to the provisions of Sec 107, T. P. Act. Such a lease is invalid, if the lessee is not a party to it. (*Srivaniava A. C. J.*)

SHYAM SUNDAR LAL vs. CHOTEY LAL.

1936 O.W.N. 758 = 164 I.C. 630

T. P. Act—(Contd.)

Sec. 107—Rent note granting lease for 11 months, if admissible to prove period of lease when not registered.

Although a lease of immovable property for less than a year is not compulsorily registrable under Sec. 17 (b), Registration Act, that section has to be read alone with Sec. 107 of T. P. Act. The effect of the two sections read together is to exclude from evidence all unregistered leases which have been reduced to writing. An unregistered rent note purporting to grant lease of property for a period of 11 months is therefore inadmissible in evidence to prove the period for which the lease is granted and the amount of rent due under it. (*Vivian Bose, J.*)

MST. NASIBAN *vs.* MAHAMMAD SAYED.

19 N.L.J. 176 = A.I.R. 1936 Nag. 174 = 164 I.C. 557.

Sec. 107—Rent of permanent tenancy if may be varied without registered instrument.

Since the Transfer of Property Act, the rent of a permanent tenancy cannot be varied without a registered document. Consequently the landlord cannot recover rent at an increased rate on the footing of an oral agreement presumed from counterfoils of rent receipts. 39 Cal. 284 followed. (*R. C. Mitter J.*)

PARBA TI CH. MUKHOPADHYA *vs.* BANDE ALI.

40 C.W.N. 839 = 162 I.C. 33 = A.I.R. 1936 Cal. 155

Sec. 111 (g)—Provisions of the section if applicable to a person in possession, alleged to be licensee paying rent.

The provisions of the Sec. III(g), T. P. Act, cannot be applied to a case where it is not alleged that at any particular time, the predecessors of a plaintiff placed those of a defendant in possession of a site on certain terms as lessees, and the allegation in the plaint merely show that the defendant is a licensee of the site who pays rent. (*Sullaiman C. J. & Bennet J.*)

KANHAIYA LALL *vs.* ABDULLA.

1936 A.W.R. 178 = 160 I.C. 866 = 1936 A.L.J. 201 = A.I.R. 1936 All. 385

T. P. Act—(Contd.)

Sec. 114—Relief against forfeiture—Significance of—Lessor not exercising right of re-entry on breach of a covenant, if estopped from exercising the right thereafter.

The power of a Court of equity to relief against forfeiture is contained in Sec. 114, T. P. Act and is confined to forfeiture for non-payment of money. So far as the right of re-entry on breach of a covenant in restraint of alienation is concerned, it is sufficient that the lessor insists upon his covenant and no one has a right to put him in different position. The mere fact that the lessor refrained from exercising his right of re-entry on one or more previous occasions whether for consideration or not does not amount to a surrender of the right to enforce the covenant when a subsequent occasion arises. No question of estoppel can possibly arise in such a case. (*Dhale & Agarwalla J.J.*)

THAKURDOYAL SINGH *vs.* PARMATHA NATH MITRA

15 Pat. 673 = 17 P.L.T. 502 = 164 I.C. 811 (2) = A.I.R. 1936 Pat. 493.

Secs. 120 & 55 (4) (b) - Provisions of the sections if apply to decrees based on an award which does not declare that a charge has been created.

The provisions of Sec. 120, read with Sec. 55, (4) (b), T. P. Act, apply to private transfers and cannot apply to decrees based on an award which itself does not contain any declaration that a charge has been created. (*Sotaman C. J. & Bajpai J.*)

MST. RAZINA KHATUN *vs.* MST. ABIDA KHATUN.

1936 A.W.R. 1049 = 1936 A.L.J. 1328

Sec. 130—Relinquishment of interest in favour of continuing co-parcener, if to be by written instrument.

In a joint Hindu family business, the members can, on retirement, relinquish their interest in favour of the continuing co-parcener, and no instrument in writing is necessary for transferring their claims under Sec. 130, T. P. Act. Accordingly in a suit to enforce a claim relinquished as above, the legal representatives of the relinquishing members are not necessary parties. (*Panckridge J.*)

BRIJMOHAN *vs.* MAHABIR.

63 Cal. 194 = 40 C.W.N. 808.

T. P. Act—(Contd.)

Sec. 136—Assignment of bond in favour of magistrate or Collector, if valid.

Sec. 136, T. P. Act, clearly forbids dealing in an actionable claim by a judge, legal practitioner or officer connected with any Court of justice. (*Srivastava & Nanavutty JJ.*)

SITLA BUX vs. MAHABIR PROSAD.

1936 O.W.N. 414 = 162 I. C. 229—
A.I.R. 1936 Oudh 273.

TRUST

Creation—Trust in favour of some creditors only—Right of other creditors to whom notice of trust given to be recognised as beneficiaries.

If a debtor conveys property in trust for the benefit of his creditors who are not parties to the conveyance and to whom the fact of his execution is not communicated, the conveyance merely operates as a power to the trustees to apply the property in satisfying their claims and is as much as the debtor himself is an act only *cestui que trust* it is revocable by him before the property is so supplied and cannot be enforced by the creditors. A trust in favour of creditors are parties to or assent to the conveyance, or if the fact of his execution is communicated to them. (*Addison & Din Mohammed J.*)

JAWAHAR SINGH & SONS vs. JAMNA DAS SHIKARPURIA.

38, P.L.R. 776 = A.I.R. 1936 Lah. 10
= 161 I. C. 502.

Charitable trust—Creation of.

The mere non-performance of charity cannot negative the existence of a charitable trust if otherwise the trust was proved; but in the absence of a deed of endowment, where the Court has to draw an inference as to the existence of the trust only from a course of conduct, the character of the enjoyment by the so called trustees will be a material factor, and the Court cannot start with the presumption that they were throughout guilty of breach of trust. (*Varadachariar & Pandrany Rao JJ.*)

VENKATA RAO RAMASWAMI AYYAR.

70 M.I. J. 407 = 1936 M.W.N. 264 = 43
M.L.W. 620 = A.I.R. 1936 Mad. 138
= 160 I. C. 1003.

Trust—(Contd.)

Debt incurred by a trustee—Creditor, if can recover the same out of trust property.

Where a trustee has incurred a debt, the creditor cannot recover the same against the trust property, in as much as trustee if he had paid the debt would have claimed indemnity out of the trust property. In other words, the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee as against the trust property, and his rights are no greater than those of the trustee. (*Courtney Terrel, C. J. & Varma J.*)

MAHABIR PROSAD MARWARI vs.
MOHAMMAD YEHIA.

15 Pat. 88 = 17 P.L.T. 393 = 163 I.C.
869 = A.I.R. 1936 Pat. 390.

Arrangement for properly carrying out duties of Trust, how far binding on parties.

An agreement arrived at between the parties for carrying out the duties of a trust, if it is conducive to the interest of smooth administration of the affairs of the trust, is really in the nature of a scheme framed for the management of the trust and will be binding upon the parties thereto and their representatives till modified either by common consent or in some manner known to law. (*Vandachariar & Stodart, JJ.*)

NILAMANI PORICHA vs. APPANNA PORICHA & ORS.

1936 M.W.N. 346 = 70 M.L.J. 262 = 43
M.L.W. 222 = A.I.R. 1936 Mad. 11 =
160 I. C. 511.

TRUSTS ACT (XII OF 1882)

Sec. 63—Chairman of Bank purchasing property with Bank money, with out taking loan of the amount Right of liquidator's to secure such property.

The chairman of the Board of Directors of a Bank purchased some properties with money of the Bank but without executing any instrument of loan. The Bank eventually went to liquidation, at which time there was no instrument of loan, nor even the resolution of the Board sanctioning a loan.

Held, the chairman being a trustee in respect of all the moneys of the Bank continued to be a trustee in respect of all

Trust Act—(Contd.)

properties that were purchased with the Bank money, and the liquidation could seize the property of the chairman. (*Young C. J. & Monroe J.*)

PEOPLES BANK vs. HAR KISHEN LAL.
38 P.L.R. 1103 = 163 I.C. 378 = A.I.R. 1936 Lah 408.

TRUSTEES AND MORTGAGEES' POWERS ACT (XXVIII OF 1866).

Sec. 12—*Notice provided for in the section, if due to mortgagor when deed excludes notice.*

The ten days' notice before the appointment of a receiver as provided for in Sec. 12 of the Trustees and Mortgagees' Powers Act is not available to the mortgagor when the deed stipulates that this particular term of the section shall be excluded. (*R.C. Mitter J.*)

DAVID ELIAS DUCK COHEN vs. BAI-DYANATH MOOKERJI.

40 C.W.N. 1270 = A.I.R. 1936 Cal. 646.

Sec. 12—*Period of notice—starting point of computation.*

In regard to the statutory notice provided for in Sec. 12 of the Trustees and mortgagees' Powers Act, the ten days time is to be calculated not from the date of the notice but from the date of the receipt thereof. (*R.C. Mitter J.*)

DAVID ELIAS DUCK COHEN vs. BAI-DYANATH MOOKERJI & ORS.

40 C.W.N. 1270 = A.I.R. 1936 Cal. 646.

UNITED PROVINCES AGRICULTURISTS RELIEF ACT (XXVII OF 1934)

Sec. 2, Proviso (2)—*"Is assessed to income-tax"—Meaning of.*

The words "is assessed" in the 2nd proviso to Sec. 2, U. P. Agricultural Relief Act mean "was assessed at the last occasion", that is to say, was assessed during the last financial year. The mere fact that during

U P Agriculturists Relief Act—(Contd.)

the current year, his return is still under examination and the Income tax Officer has not yet decided whether he should or should not be assessed to income-tax should not make any difference. (*Sulaiman C. J. & Bennet, J.*)

RAJNARAIN vs. BINDARAN.

1936 A.L.J. 501 = 1936 A.W.R. 428 = A.I.R. 1936 All. 449 = 163 I.C. 828.

Secs. 3, & 5 and Sch. III—*Interest before and after date of Trial Court's decree, how to be calculated.*

The words "any order for grant of instalments passed against an agriculturist" used in Sec. 4 U. P. Agriculturist Relief Act, should be confined in their application to orders passed under Sec. 3. Consequently interest both before as well as after the date of the lower Court's decree should be calculated according to the rate applicable to the case under Sch. III. (*Srivastava & Nana-vutty JJ.*)

KAILASH KUER vs. AMAR NATH.

1936 O.W.N. 478 = 162 I.C. 396 = A.I.R. 1936 Oudh. 334.

Sec. 3 (1) & 5—*"Decree" in proviso to Sec. 3 (1)—Meaning of, for the purposes of Sec. 5.*

For the purpose of Sec. 5 of the U. P. Agriculturists Relief Act, the meaning of the word "decree" in the first proviso to Sec. (1) is the decree for instalments and not the original decree which is converted into a decree for instalments. Accordingly, the Court at the time of passing an instalment decree under Sec. 5 of the Act shall reckon the period of instalments from the date of the instalment-decree and not from the date of the original decree. (*Allsoop J.*)

RAM GHULAM vs. BANDU SINGH.

1936 A.W.R. 428 = 1936 A.L.J. 465 = 163 I.C. 564 = A.I.R. 1936 All. 434.

Sec. 5—*Additional Subordinate Judge in Oudh dismissing application under the section—Court competent to entertain an appeal from the order of dismissal.*

U. P. Agriculturists Relief Act—(Contd.)

An appeal against an order passed by an Additional Subordinate Judge of Oudh dismissing an application made to him under Sec. 5, U.P. Agriculturists Relief Act, lies to the District Judge and not to the Oudh Chief Court. (*King C. J. & Srivastava J.*)

RAGHURAJ SINGH vs. SANKAR SAHAY.

1936 O.W.N. 534 = 162 I.C. 841 = A.I.R. 1936 Oudh. 321.

Secs. 5 & 8—Application under Sec. 5 by subsequent purchaser of mortgaged property—Essentials.

After the passing of a preliminary decree for sale in a mortgage suit to which the heirs of the mortgagor and the subsequent purchaser of the property were made parties, the subsequent purchaser put in an application that the decree might be converted into a decree for payment by instalments under the provisions of Sec. 5, U. P. Agriculturists Relief Act. *Held*, that in order that Sec. 5 should apply to the subsequent purchaser it was necessary for him to establish three facts, namely (1) that the mortgagor was an agriculturist; (2) that he himself was an agriculturist on the date of the loan; & (3) that he himself was an agriculturist at the date of the institution of the suit in which the decree was passed. (*Allsop J.*)

RAM GHULAM vs. BANDA SINGH.

1936 A.W.R. 428 = 1936 A.L.J. 465 = 163 I.C. 564 = A.I.R. 1936 All. 434

Sec. 30—Loan to agriculturist under mortgage deed—transferee repaying loan, if can get the benefit of the section, though not an agriculturist.

If money advanced to an agriculturist under a mortgage deed is a loan within the meaning of Sec. 30, U. P. Agriculturists' Relief Act, a transferee from him, who has to repay that money, though not an agriculturist, is entitled to the benefit of the provisions of Sec. 30, in respect of interest

U. P. Agriculturists Relief Act—(Contd.)

contained in that section. (*Niamatullah & Allsop JJ.*)

MISRI LAL vs. ALEXANDER GARDINER.

1936 A.W.R. 682 = 1936 A.L.J. 1250 = A.I.R. 1936 All. 697 = 165 I.C. 210

Sec. 30 Mortgage decree—Court, if can reduce rate of interest for a period after January 1, 1930.

Sec. 30 of the U. P. Agriculturists Relief Act gives only the power to the Court to change the rate of interest after the 1st January, 1930. The Court has no jurisdiction to interfere with the rate of interest provided in a decree on the basis of a mortgage for the period before the 1st January, 1930, either under the U. P. Agriculturists Relief Act or under the Usurious Loans Act. (*Allsop J.*)

RAMNARAIN vs. MAHMUD HASAN.

1936 A.W.R. 471 = 1936 A.L.J. 510 = 163 I.C. 537 = A.I.R. 1936 All. 450.

Secs. 30 & 31—"On loan", meaning of.

The words "on loan" in Sec. 30, U. P. Agriculturists Relief Act, means no more than "in respect of a loan." In Sec. 30 (1) the word has been used in contrast with the words "the sum originally borrowed used in Sec. 31 and it is not intended to signify only the principal amount but implies the amount found due under the terms of contract or decree up to 31st December, 1929. Sec. 30 provides only for reduction of the rate of interest from 1st January, 1930, on the amount found due under the terms of the contract under Cl. (1) or under the terms of the decree under Cl. (2) of the Section. (*Srivastava & Nanaully JJ.*)

KAILASH KUR vs. AMAR NATH.

1936 O.W.N. 471 = 162 I.C. 396 = A.I.R. 1936 Oudh. 334.

Sec. 30 (1) (2)—Section whether refers to interest on loan or to interest on total amount due.

U. P. Agriculturists Relief Act—(Contd.)

Under Sub-Sees. 1 & 2 of Sec. 30, U. P. Agriculturists Relief Act, it is provided that the interest on the loan should not exceed the rate higher than that mentioned in the schedule. The section refers to the interest on the loan and not to the interest on the total amount due. (*Bennet J.*)

RAMMAN LAL vs. KAMLADAT.

1936 A.W.R. 987 = A.I.R. 1936 All. 864

UNITED PROVINCES ASSISTANCE OF TENANTS ACT (VIII OF 1932)

Sec. 4—*Section, if applies to decrees passed before the Act came into force.*

Sec. 4, U. P. Assistance of Tenants Act applies only to decrees for arrears of rent for the years 1337 and 1338 F. which were actually passed before the date upon which this Act came into force, but which were not executed at the time the Act came into force. (*Harris, J.*)

ZAHUR HUSSAIN vs. CHURA SINGH.

1936 A.W.R. 218 = 1936 A.L.J. 132 = A.I.R. 1936 All. 366 = 161 I.C. 52

Sec. 4—*Tenant not making any application that act be applied to his case, nor making deposit, if can claim benefit of Sec. 4.*

Where a tenant or a Thikadar makes no application that the U. P. Assistance of Tenants Act be applied to the case for arrears of rent against him, nor deposits in Court an instalment equal to one-fourth of the sum decreed, he cannot claim the benefit of the provisions of Sec. 4 of the Act. (*Harris, J.*)

ZAHUR HUSSAIN vs. CHURA SINGH.

1936 A.W.R. 218 = 1936 A.L.J. 132 = A.I.R. 1936 All. 366 = 161 I.C. 52

UNITED PROVINCES COURT OF WARDS ACT (IV OF 1912).

Sec. 37—*Claim for necessities supplied if barred.*

Sec. 37, U. P. Court of Wards Act is no bar to a claim under Sec. 98 of the Con-

U. P. Court of Wards Act—(Contd.)

tract Act for recovery of the price of necessities supplied. (*Ganga Nath J.*)

VISHWA NATH KHANNA vs. SHIAM KRISHNA.

1936 A.W.R. 924 = 1936 A.L.J. 1120 = A.I.R. 1936 All. 819

UNITED PROVINCES ENCUMBERED ESTATES ACT.

Sec. 7 (1) (a)—*Proceedings for compulsory registration of a document, if can be stayed.*

Proceedings pending before a District Registrar for the compulsory registration of a sale deed, on the executant refusing to register it, cannot be regarded as a proceeding in respect of any public or private debt to which the transferor is subject, or with which his immovable property is encumbered, even though the sale deed purports to have been executed for the payment of certain debts. Therefore, if after the execution of the sale deed the transferor institutes proceedings under the U. P. Encumbered Estates Act, he is not entitled to obtain an order under Sec. 7 (1) (a) of the Act for stay of proceedings for compulsory registration of the sale deed. (*Srivastava A. C. J. & Smith J.*)

SITLA BAKSHI SINGH vs. BALAKAND.

1936 O.W.N. 877 = 165 I.C. 129

UNITED PROVINCES LAND REVENUE ACT (III OF 1901).

Sec. 4 (3)—*Lambardar if can be an under proprietor or pukhtadar.*

In the case of an underproprietory or pukhtadari mahal, where all the co-shares are under-proprietors or pukhtadars, the lambardar must be an underproprietor or pukhtadar. There is nothing in the definition of lambardar in Sec. 4 (3) of U. P. Land Revenue Act to confine the application of the word to a superior proprietor. (*Srivastava A. C. J. & Zia-ul Hassan J.*)

HARBANSLAL vs. DHIRAJA KUER.

1936 O.W.N. 599 = 164 I.C. 421 = A.I.R. 1936 Oudh. 371

U. P. Land Revenue Act—(Contd.)

Secs. 4(15) & 75—*Person having proprietary interest in a particular plot—provision of the section if applies.*

Sec. 75, U. P. Land Revenue Act deals with the case of a whole mahal in which there are inferior and also superior proprietors, and the case of a person having inferior proprietary interest in a particular plot does not come under it, such a case being not known to the Land Revenue Act. Acquisition of proprietary interest in a particular plot in a mahal does not give rise to any inferior proprietary rights. (*Bennet & Smith JJ.*)

KESHAVA PRASAD SINGH vs. MST. BENI KUNWAR.

1936 A.W.R. 723 = 1936 A.L.J. 1058 = A.I.R. 1936 All. 731 = 164 I.C. 877

Secs. 79 & 218 *Powers of revision of Board of Revenue if must be exercised within any fixed time.*

The orders of a Settlement Officer passed under Sec. 79, U. P. Land Revenue Act are liable to be revised by the Board of Revenue under Sec. 218 of the Act after the close of the Settlement operations. No time limit is fixed within which revisional powers are to be exercised and there is nothing in the statute which would prohibit the Board of Revenue from correcting an error made by the Settlement Officer, even though the error has come to light after the close of settlement operations. (*King C J.*)

MAHDUB ALI KHAN vs. RANI JAIRAJ KUAR.

159 I.C. 776 = 1936 O.W.N. 110 = A.I.R. 1936 Oudh 75

Sec. 141—*Provisions of the section, if can apply to decree-holder under Sec. 221, Agra Tenancy Act.*

There is nothing in the U. P. Land Revenue Act or in the Agra Tenancy Act to indicate that Sec. 141, U. P. Land Revenue Act can apply to a decree-holder under Sec. 221, Tenancy Act. Where therefore a lamhardar obtains a decree under Sec. 221, Agra Tenancy Act for arre-

U. P. Land Revenue Act—(Contd.)

ars of revenue paid by him on behalf of a co-sharer, the first charge cannot be applied to his decree as against a prior mortgage decree of another decree-holder. (*Sulaiman C. J. & Bennet, J.*)

MALLHA KHAN vs. GULAB SINGH.

1936 A.W.R. 152 = 165 I.C. 446 = 1936 A.L.J. 63 = A. R. 1936 All. 184.

UNITED PROVINCES MUNICIPAL ACT (II OF 1916).

Sec. 97—*Contract to execute repairs and constructions of work ordered by Municipal Engineer from time to time during a certain period—Legality.*

Where under an agreement between a Municipal Board and a contractor, the contractor agrees and binds himself to execute the repairs and construction of all works that might be ordered by the Municipal Engineer from time to time during a certain period, and the Municipal Board agrees to pay the contractor at the sanctioned scheduled rates for all repair and construction of works that he might do on the orders given by the Municipal Engineer, the agreement is a contract within the meaning of Sec. 97, U. P. Municipalities Act, 1916 (*Per Sulaiman C. J. & Bennet J. Smith J. dissenting*)

THE MUNICIPAL BOARD, AGRA vs. RAM LAL.

1936 A.W.R. 703 = 165 I.C. 439 = 1936 A.L.J. 841 = A.I.R. 1936 All. 723 (S.B.)

Sec. 128 (1) (ix)—*Banking business—Assignment of Municipal tax—Profits how to be calculated.*

In calculating the profits of a firm or company carrying on banking business for the purpose of assessing taxes under Sec. 128 (1) (iv) U. P. Municipalities Act, it is reasonable to make deduction from the gross profits, all expenses necessarily incurred by the bank for the purpose of carrying on the business and earning the profits. The profits which are to be taken as the basis of assessment mean net profits to be calculated by deducting from the gross profit, all expenses necessarily incurred for

U. P. Municipal Act—(Contd.).

the purpose of carrying on the business and earning the gross profits. (*King C. J. & Zia Ul-Hasan JJ.*)

ALLAHABAD BANK LTD. vs. MUNICIPAL BOARD, SITAPUR.

1836 O.W.N. 186=160 I.C. 803=A.I.R. 1936 Oudh. 206

Secs. 151 & 164—*Suit for refund of house and water taxes for period during which premises remained vacant—maintainability.*

A suit brought for remission or refund of certain house and water taxes charged by a Municipal Board for the period during which the plaintiff alleges the premises to have remained vacant, and claims remission under Sec. 151 of the U. P. Municipalities Act, is not barred by Sec. 164 of the Act (*Sulaiman C. J. & Niamatullah & Bennet JJ. dissenting.*)

MUNNA LAL vs. MUNICIPAL BOARD, CAWNPORE.

1936 A.W.R. 754=1936 A.L.J. 879=A.I.R. 1936 All. 676=165 I.C. 167

Sec. 180 (3)(4)—*Construction of bye-law sanction, if can be given under Sub-Sec. (3).*

In view of the provisions of Sub-Sec. (4) of Sec. 180 U. P. Municipalities Act, a person cannot be deemed to have been given sanction for a construction under Sec. 180 (3) of the Act, if the construction is in contravention of any bye law framed under the Act. (*Ganganath J.*)

NARAINDAS vs. MUNICIPAL BOARD, GORAKHPUR.

1936 A.W.R. 31=161 I.C. 443=A.I.R. 1936 All. 451

UNITED PROVINCES TOWN AREAS ACT (II OF 1914.)

Sec. 3—*Village declared a town area—presumption of ownership.*

The presumption that in an agricultural village the zemindar is the owner of every inch of land, does not apply, if the village

U. P. Town Areas Act—(Contd.)

has been declared to be a town area. (*Sulaiman C. J. & Bennet J.*)

BEHARI LAL vs. SUKHBIR SINGH & ANR.

1936 A.W.R. 29=161 I.C. 440=A.I.R. 1936 All. 442

Sec. 18(1) & (4)—*Liability to pay tax—decision of District Magistrate, if final.*

The word 'assessment of levy' in Sec. 18 (1), U. P. Towns Areas Act cover the ascertainment of what person shall pay the tax and what shall be the amount of tax they shall pay. The decision of the District Magistrate on the question of liability is final and cannot be called in question in a Civil Court. (*Sulaiman C. J. & Bennet J.*)

SHEO-NARAIN vs. TOWN AREA PANCHAYET, CHAIRMAN.

1936 A.L.J. 33=A.I.R. 1936 All. 117=159 I.C. 897=1936 A.W.R. 107

UNITED PROVINCES TOWN IMPROVEMENT ACT (VIII OF 1919)

Secs. 53, 59 & 64(b)—*Jurisdiction of tribunal to hear dispute as to sufficiency of compensation in the absence of one member.*

Where a dispute as to sufficiency of compensation in a land acquisition case is referred to a Tribunal under Sec. 53, U. P. Town Improvement Act, it is necessary, except in the case of Sec. 64 cl. (b), that the case should be heard by all the members of the Tribunal. Accordingly, where one of the members of the Tribunal is absent at the time of examination of a witness, the defect vitiates the trial. The mere fact that the member who was absent, subsequently reads the evidence recorded in his absence would not satisfy the requirements of a proper trial. (*Harries & Ganganath JJ.*)

SECRETARY OF STATE FOR INDIA vs. ANWAR HUSSAIN.

1936 A.W.R. 688=1936 A.L.J. 995=A.I.R. 1936 All. 525=164 I.C. 208

Sec. 59 (6)—*Tribunal hearing evidence in absence of one of its members—decree by tribunal, is without jurisdiction.*

U. P. Town Improvement Act—(Contd.)

Sec. 59 (6), U. P. Town Improvement Act, 1919, contemplates that when one member of the tribunal becomes unavoidably absent another member must be appointed in his place, and it is not possible for the tribunal to proceed with the hearing of a witness in the absence of one of its members such the decree passed by tribunal is without jurisdiction, even though on a later date all the members of the tribunal were present and the case was argued and judgment was given in which all the members of the tribunal agreed. (*Bennet & Harries JJ.*)

SECRETARY OF STATE FOR INDIA vs. NURAN BIBI.

1936 A.W.R. 771 = 1936 A.L.J. 1155 = A.I.R. 1936 All. 703 = 165 I.C. 461

Sec. 3 (1)(b)—*Certificate under the Section a form of—what it should show.*

When any certificate is granted under Sec. 3 (1) (b) of the U. P. Town Improvement (Appeal) Act, 1920, it is of the utmost importance that this certificate should show clearly upon the face of it that the tribunal has considered the application for leave to appeal upon its merits and has come to the conclusion that the case is a fit one for appeal. A mere order by the president of the Tribunal that "sanction to go up in appeal is granted as prayed" is not a sufficient compliance with the terms of the section and an appeal on the basis of such a certificate to the High Court would be incompetent. (*Harries & Rachpal Singh JJ.*)

SECRETARY OF STATE vs. ZAHID HUSSAIN.

1936 A.L.J. 35 = 1936 A.W.R. 77 = 163 I.C. 689 = A.I.R. 1936 All. 460

Sec. 3 (1) (b)—*Party inviting tribunal to adopt a certain method of valuation, if can appeal on the ground that the method adopted is wrong.*

Where a party invites the tribunal to adopt a certain method of valuation to ascertain the market value of the property, such a party cannot at a later stage ask the High Court for special leave to appeal upon the ground that a wrong method of

U. P. Town Improvement—(Contd.)

valuation had been adopted by the Tribunal. (*Harries & Rachpal Singh JJ.*)

SECRETARY OF STATE FOR INDIA vs. ZAHID HUSSAIN.

1936 A.L.J. 25 = 1936 A.W.R. 77 = A.I.R. 1936 All. 460 = 163 I.C. 689

USURIOUS LOANS ACT (X OF 1918)

Sec. 3, Proviso 2—*Scope and applicability.*

The second proviso to Sec. 3, Usurious Loans Act prohibits the Court from exercising its powers under Sec. 3 in all cases where any decree of a Court is affected, whether such decree be *inter partes* or not, (*Harries & Ganga Nath JJ.*)

IBNEY HASAN vs. GULKANDI LAL.

1936 A.W.R. 805 = 1936 A.L.J. 919 = A.I.R. 1936 All. 611 = 164 I.C. 325

VENDOR AND PURCHASER.

Clause in sale deed providing for indemnity, if vendee is dispossessed—interpretation of the clause.

Where a sale deed contains an indemnity clause providing for making good any loss occurring to the vendee by reason of his being dispossessed of the property sold to him, the clause must be interpreted to mean actual dispossession of the vendee from the property sold and therefore this contingency cannot be said to have arisen merely by the passing of the decree affecting the lands sold. (*King C. J. & Smith J.*)

NANAK CHAND vs. IRSHAD HUSAIN.

1936 O.W.N. 148 = A.I.R. 1939 Oudh. 138 = 160 I.C. 960

Earnest money—Vendee, if can recover earnest money when the breach of contract of sale has been on his part.

Earnest money is a guarantee for the performance of the contract. If the transaction goes forward, it is a part of the purchase price, but if it fails through on account of default or breach by the vendee, it is forfeited in the absence of, contract either express in its terms or to be inferred from the whole contract. If the purchaser says that the

Vendor and Purchaser—(Contd.)

earnest money has not been forfeited though the breach is on his part, he has to show the agreement prevents forfeiture. This he can do if the contract says so in plain terms or if the same can be inferred from all the terms of the contract itself. (*R. C. Mitter J.*)

KRISHNA CHANDRA RUDRA PAL vs. KHAN MAHMUD BEPARI.

63 Cal. 804 = 161 I.C. 166 = A.I.R. 1936 Cal. 51

WILL.*Principles of construction.*

In construing a will what is needed that the court should read the will as a whole, and consider all the clauses and the circumstances, and give effect to it as far as the law permits. Importance should not be attached to isolated expressions. If there are words here and there which are repugnant to words by which an intention is clearly expressed they have to be discarded. (*Khaja Mohammed Noor & Saunders JJ.*)

KANHAYA LALL MISSIR vs. HIRA BIBI,

15 Pat. 151 = 17 P.L.T. 131 = 163 I.C. 940 = A.I.R. 1946 Pat. 323

Principles of construction—"children successively one after another", meaning of.

Where a will conferred a life estate on a female, and provided that after the death of the female, the estate was to pass to her daughter and her children, successively one after another, held, that the words "and her children successively one after another," were not to be construed as creating perpetual successive life estates, but were words of succession and the intention of the testator was to bequeath an absolute estate to the daughter. (*Khaja Mohammed Noor & Saunders JJ.*)

KANHAYA LALL MISSIR vs. MST. HIRA BIBI.

15 Pat. 151 = 17 P.L.T. 131 = 163 I.C. 940 = A.I.R. 1936 Pat. 323.

Construction—intention of the testator, how to be ascertained.

Will—(Contd.)

In order to gather the intention of the testator, the Court is to look to the terms of the entire will and then come to a conclusion. The intention of the testator cannot be gathered by taking into consideration only an isolated passage in the Will and by ignoring the other passages or expressions which are to be found in it. (*Harris & Rachpal Singh JJ.*)

CHIRANJILAL vs. SRI THAKUR BARE MADAN MOHAN LALLI.

1936 A.L.J. 214 = 1936 A.W.R. 351 = 164 I.C. 621 = A.I.R. 1936 All. 186

Construction—Testator bequeathing two plots of land to D. two leasehold houses to B - Bequest to B failing—Effect of.

A lady owning certain leasehold property and other personalty, by her will provided that her niece should receive two plots of land and there was a specific bequest of two leasehold houses to one B. Provision was also made for the sale of two houses and for payment of the proceeds to B. for church purposes. All the bequests to B failed and in so far as they represented personal property and effects possessed by the testator at the time of her death, they passed to her niece. Held, that once it was established that the effect of the will was to indicate an intention on the part of the testator not only to give her niece certain specified plots of land but also all personal property and effects not otherwise validly disposed of, it followed that upon the failure of the bequests to B, the property which was the subject matter of those bequests including the leasehold house fell into the residue. (*Page C. J. & Mya Bu J.*)

MRS. ELIZABETH BESS O'DONOHUE vs. MRS. P. A. SUTHERLAND & ORS.

A.I.R. 1936 Rang. 134 = 161 I.C. 997

Will, if can be superseded by a subsequent family arrangement among heirs and acted upon—duty of probate Court.

A family arrangement made among the sons of a testator and acted upon by

Will—(Contd.)

them in supercession of a will left by him prevail against the terms of the Will and will be valid and binding among the parties though such arrangement is made verbally. It is not within the province of the Probate Court to see whether a will has been superseded by a subsequent family arrangement, the duty of that Court being merely to see whether the Will is genuine or not. (*M. C. Ghosh J.*)

GOPAL CHANDRA ADAK vs. HARI-MOHAN ADAK.

62 C.L.J. 380

Suit for accounts against executors or administrators—General order that each will be responsible for misconduct of another if legal—executor when liable for devastavit by co-executor.

In a suit for account against executors or administrators, there cannot be a general order that as between themselves, each executor or administrator will be responsible for the conduct of the other or others. In regard to each disputed transaction, the conduct of each of the executors or administrators must be examined, one be responsible for a devastavit by another only if he has contributed to it intentionally, by standing by or otherwise. 10 C. L. J. 503 followed (*D. N. Mitter & Patterson JJ.*)

HAREY HAREY SINHA CHOWDHURY vs. HARI CHAITANYA SINHA CHOWDHURY.

40 C.W.N. 1237.

Discovery and ascertainment of assets as a preliminary to partition—liability for accounts of executors who are managing members.

With regard to discovery and ascertainment of assets as a preliminary to partition, those executors of the will of the testator who are managing members are liable only for an account as to the existing state of the property divisible, but in order to ascertain the same an enquiry as to what the assets were at the death of the testator is necessary. Such managing members are bound to account for properties which came into their possession at the death of the testator

Will—(Contd.)

and if it be found that they misappropriated any, they will be accountable on the footing of wilful default. (*D. N. Mitter & Patterson JJ.*)

HAREY HAREY SINHA CHOWDHURY vs. HARI CHAITANYA SINHA CHOWDHURY.

40 C.W.N. 1237.

WORDS AND PHRASES.

Decree obtained by fraud on Court—collusion is not appropriate term to apply to such decree.

Collusion is not the appropriate term to apply to the obtaining of a decree by a fraud on the Court; the term suggests that the Court was implicated in the matter. (*Lord Thankerton.*)

BINDHESWARI CHARAN SINGH vs. BAGESWARI CHARAN SINGH.

15 = Pat. 203 = 1936 A.W.R. 85 = 160 I.C. 68 = 1936 A.L.J. 104 = 17 Pat. L.T. 28 = 38 Bom. L.R. 339 = 1936 O.W.N. 127 = 1936 M.W.N. 321 = A.I.R. 1936 P.C. 46 = 70 M.L.J. 122 (p.c.)

Usage and law, distinction between.

In common parlance, the expressions "usage" and "law" are interchangeable, since usage when proved or admitted has the force of law. (*Agha Haider J.*)

RAMLAL LILU SHAH vs. KANISHI RAM.

38 P.L.R. 859 = A.I.Z. 1936 Lah. 649

WORKMEN'S COMPENSATION ACT (VIII OF 1923).

Sec. 2 (1) (n)—*Person working as one of a gang-working in partnership under a sub-contract, if a workman.*

In order to be a workman within the meaning of the Workmen's Compensation Act the person claiming to be a workman must be under a contract of service with some other person. Where the deceased was a member of a coolie gang who carried out the work in collaboration and partnership under a sub-contract, *held*, that he could not be said to be employed by the other persons of the partnership, and was

Workmen's Compensation Act—(Contd.)

therefore not a workman within the meaning of the Workmen's Compensation Act. (*Page, C. J., Mya Bu & Mackincy JJ*)

WORKMAN'S COMPENSATION OF JAGLIPATHAN IN RE.

A.I.R. 1936 Rang. 89=161 I.C. 992.

SECS. 2 (g), 4 (i) (c) & 30—Blacksmith employed in a factory losing index and middle fingers—Basis of compensation.

Where a blacksmith employed in a factory lost the index and the middle finger of his right hand in an accident and claimed compensation for permanent partial disablement, *held*, that the Court could not award compensation on the basis that the workman had lost the use of the right hand unless it came to the finding that the workman had lost completely and permanently the use of the thumb and the other fingers of the right hand so as to reduce his earning capacity in every employment which he was capable of undertaking at the time of the accident. (*Bajpai J.*)

UPPER DOAB SUGAR MILLS LTD. vs. DAULAT RAM,

1936 A.L.J. 701=163 I.C. 644=1936 A.W.R. 588=A.I.R. 1936 All. 493

Workmen's Compensation Act—(Contd.)

SECS. 10 & 30—Reason for delaying to apply for compensation—substantial question of law.

Whether certain facts do or do not constitute sufficient reason for explaining the delay in making a claim within the meaning of the proviso to section 10 (1) of the Workmen's Compensation Act raises a substantial question of law, within the meaning of the proviso to Sec. 31 of the Act (*Courtney Terrel & C. J. Dhanu J.*)

B. FORSYTH vs. B. N. RAILWAY CO.

17 P.L.T. 33=162 I.C. 817=A.I.R. 1936 Pat. 307

Sec. 2 cl. (xvi)—Workman, meaning of workman officiating in a loan vacancy—effect.

The various qualifications mentioned in cl. (xvi) of Such. 2 of the Workmen's Compensation Act, as amended by Act, XV of 1933 are mutually exclusive. It follows that anyone employed in the making of an excavation whose depths from its highest to the lowest point exceeds 20 feet would be a workman. The mere fact that the workman was officiating in a leave vacancy would not take him out of the definition of a workman. (*Sulaiman C. J & Bennet J.*)

AKAM SINGH, IN RE.

1936 A.W.R. 770=1936 A.L.J. 1271

THE CURRENT LAW DIGEST 1936.

CRIMINAL

ADEN CIVIL & CRIMINAL JUSTICE REGULATION (VI OF 1933.)

Sec. 35—*Revisional jurisdiction of Sessions Judge-power to convert acquittal into conviction.*

Sec. 35 (3) of the Aden Civil & Criminal Justice Regulation, which is the only provision dealing directly with revision empowers the Sessions Judge to call for any proceedings of any Magistrate at any stage and to pass such orders thereon as he thinks fit. There is nothing in the section to imply that the Sessions Judge's powers of revision are those of a Sessions Judge under the Cr. P. Code. It is extremely doubtful whether the Sessions Judge can be said to have the power under Sec. 35 (3), to convert an acquittal into a conviction. (*Bromfield & Macklin JJ.*)

L. M. MARINO vs. EMPEROR,

59 Bom. 663

ARMS ACT (XI OF 1879).

Sec. 4—*Empty cartridge cases, if comes with in the definition of ammunition.*

Empty cartridge cases come within the definition of ammunition under the Arms Act, and therefore it is an offence under the Act to have an empty cartridge case in one's possession. 21 A. L. J. 879 relied on; 23 A. L. J. 455, 24 A. L. J. 209 dis-

Arms Act (Contd.)

sented from. (*Allsop & Ganganath JJ.*)

EMPEROR vs. BHOPAL SINGH.

1936 A. W. R. 216 = 161 I. C. 912 = 37
Cr. L. J. 727 = 1936 A. L. J. 657 = 1936
Cr. C. 504 = A. I. R. 1936 All. 962

Sec. 4—*Lead in shape of bullet, if ammunition.*

A piece of lead in the shape of a bullet or in the shape of shot is ammunition or a part of ammunition. Lead as such does not, in such a shape, exclude from the meaning of the term although lead can be made up into cartridges. (*Allsop & Ganganath JJ.*)

EMPEROR vs. BHOPAL SINGH.

1936 A. W. R. 216 = 161 I. C. 912
= 37 Cr. L. J. 727 = 1936 A. L. J. 657 =
= 1936 Cr. C. 504 = A. I. R. 1936 All. 392

Sec. 19 (b)—*Knowledge of whereabouts of fire arm, if involves possession and control.*

Merely because a man knows where a fire arm lies illegally concealed, he cannot be said to have it under his possession or control within the meaning of Sec. 19 (b)

Arms Act (Contd.)

of the Arms Act. (*Cunliffe & Henderson JJ.*)

CHERU SHEIKH vs. EMPEROR.

40 C. W. N 1374

Sec. 19 (b)—All members of a Hindu Joint family, if can be prosecuted in respect of weapons found in room in the joint family dwelling house, not in the exclusive possession of any individual member.

Certain weapons and other articles having been found in a Hindu Joint family dwelling house; the manager of the joint family as also the other members of the family were proceeded against under the Arms Act and convicted under Sec. 19(b) of the Act. *Held*, that in the absence of proof that the room in which the weapon was kept was in the exclusive or particular possession of any member of the joint family, it could not be inferred that the weapon was in the possession of any other member of the family than its manager, and therefore the other members of the family were entitled to be acquitted. (*Agarwalla & Madan JJ.*)

MANGAR KOIRI vs. EMPEROR.

17 P. L. T. 573 = A. I. R. 1936 Pat. 512
= 15 Pat. 696 = 165 I. C. 803 (1) = 1936
Cr. C. 820

BENGAL CRIMINAL LAW AMENDMENT ACT (IX OF 1925).

Sec. 2 (1)—Order not reviewed by Government within one year, if remains in force after one year.

Where an order made on 7-1-33 was amended on 31-3-33, and a further order was made on 15-6-34, and there was no review of the first two orders within the time required by law, *held*, that the orders were not in force after the expiry of one year from the date on which they were made, and the accused could not be charged with disobeying the order after the expiry of one year. (*Lort Williams & Jack, JJ.*)

HIRANMOY BHAUMICK vs. EMPEROR.

A. I. R. 1936 Cal. 16 = 160 I. C. 743
= 8 R. A. 452 = 37 Cr. L. J. 377
= 1936 Cr. C. 72

BENGAL EMBANKMENT ACT. (II OF 1882).

Secs. 76 B & 79—Breaches in embankment filled up without permission of Collector—order by Sub-Deputy Magistrate convicting accused under Sec. 76B—application to District Magistrate for rescinding the order of the Sub-Deputy Magistrate—Order rescinded after period of appeal expired—validity of District Magistrate's order.

The accused were tried and convicted by a Sub-Deputy Magistrate on a charge of having filled up certain breaches in the embankment without the permission of the Collector, and sentenced to pay a fine of Rs. 5/-, and were *inter alia* ordered to remove the obstruction within a fortnight. Long after the period of appeal had expired, the District Magistrate on application by the accused modified the order of the trying Magistrate and ordered that the directions to remove the obstructions within a fortnight need not be carried out. *Held*, that the order of the Sub-Deputy Magistrate directing removal of the obstruction was entirely improper, but the order of the District Magistrate passed otherwise than in appeal to the effect that the order of the Subordinate Court need not be carried out, was equally without jurisdiction, and both orders to be set aside. (*Macpherson J.*)

MAHARAJADHIRAJ SIR KAMESHWAR SINGH BHADUR vs. THE KING EMPEROR.

17 P. L. T. 412 = 163 I. C. 965 = 37 Cr. L. J. 875
= 1936 Cr. C. 660 = A. I. R. 1936 Pat. 413

BENGAL EXCISE ACT (V OF 1919)

Secs. 74 & 81—Procedure to be followed in investigation by Excise Authorities.

The Bengal Excise Act does not lay down a complete procedure for investigation of offences under the Act, and it is clear from the provisions of Chapter IX of the Act, that in investigations into offences under the Act, the procedure laid down in the Criminal Procedure Code must be followed. (*Guha & Bartley JJ.*)

GUBBAY vs. EMPEROR.

63 Cal. 780 = 40 C. W. N. 415
37 Cr. L. J. 438 = 1936 Cr. C. 196
= 161 I. C. 238 = A. I. R. 1936 Cal. 65.

BENGAL SUPPRESSION OF IMMORAL TRAFFIC ACT (VI OF 1933).

Sec. 6(5)—*Owner of house and sub-tenant under tenant served with order under Sec. 6(2) after notice to quit to tenant—owner unable to commence action in ejectment against sub-tenant because of vacation—owner, if liable to be convicted.*

When the owner of a house has already given his tenant notice to quit, and thereafter an order is served upon him as also upon a sub-tenant under his tenant under Sec. 6(2) of the Suppression of Immoral Traffic Act, requiring discontinuance of the use of the house as a brothel but the sub-tenant does not vacate the house till considerably later than the period stated in the order, and the Civil Court being closed, the owner cannot commence an action for ejectment before she actually leaves, he cannot be convicted under Sec. 6(5) of the Act. (*Nasim Ali J.*)

MAHADEO PRASAD vs. EMPEROR.

40 C. W. N. 350

BENGAL SUPPRESSION OF TERRORIST OUTRAGES ACT (XII OF 1932).

Sec. 25—*Local Government, if may appoint special Magistrate to try case 'prima facie' disclosing offence punishable with death—Opinion of Government, if final.*

Sec. 25 of the Bengal Suppression of Terrorist Outrages Act, 1932, does not empower the Local Government to order trial by a special magistrate of a case where an offence punishable with death is *prima facie* disclosed by the prosecution evidence. Where the Government does direct the trial of such a case by a special magistrate, its opinion is not final and the magistrate's jurisdiction may be questioned in an appeal from the judgment and order passed. (*Cunliffe & Henderson JJ.*)

SASADHAR CHATTERJEE & ORS. vs. EMPEROR.

40 C. W. N. 959.

Secs. 25, 26 & 34—*Special Magistrate, if has power to tender pardon under Sec. 337, Cr. P. Code.*

Bengal Suppression of Terrorist Outrages Act (Contd.)

A special magistrate appointed under Sec. 24 of the Bengal Suppression of Terrorist Outrages Act, has power to tender a pardon under the provisions of Sec. 337, Cr. P. Code. (*Derbyshire C. J. Panckridge M. G. Ghose & Bartley JJ. Mukherjee, J. dissenting*).

HARIHAR SINHA & ORS. vs. EMPEROR.

40 C. W. N. 876 = 163 I. C. 9 = 63 C. L. J. 307 = 37 Cr. L. J. 758 = 1936 Cr. C. 538 = A. I. R. 1936 Cal 356 (F. B.)

BENGAL SUPPRESSION OF TERRORIST OUTRAGES (SUPPLEMENTARY) ACT (XXIV OF 1932).

Sec. 3(2)—*Powers of High Court in appeal.*

Under Sec. 3(2) of the Bengal Suppression of Terrorist Outrages (Supplementary) Act the High Court has all the powers of an appellate court referred to in Sec. 423 of the Cr. P. Code. (*Cunliffe & Henderson JJ.*)

SASADHAR CHATTERJEE & ORS. vs. EMPEROR.

40 C. W. N. 959

Sec. 3(2)—*Several accused tried jointly by special magistrate with regard to some of whom want of jurisdiction established—Proper order as to the rest.*

Where nine persons had been tried by a special magistrate and objection to the jurisdiction of the magistrate could strictly be taken on behalf of only five, but the other four, according to the prosecution case, were closely associated with them in the commission of the offence punishable with death and the High Court decided to set aside the conviction and sentences on the ground of jurisdiction, *held*, that it was not in the public interest to confine the order of the High Court to the five appellants on behalf of whom objection to jurisdiction had been taken and the order that was proper to pass in such a case was one to set aside the convictions and sentences of all the nine persons. (*Cunliffe & Henderson J. J.*)

SASADHAR CHATTERJEE & ORS. vs. EMPEROR.

40 C. W. N. 959

CURRENT LAW DIGEST

Bengal Suppression of Terrorist Outrages Act (Contd.)

Sec. 5—*Sentence passed under the Bengal Suppression of Terrorist Outrages Act (XII of 1932) if may be reduced in revision.*

Sec. 107 of the Government of India Act ought not to be invoked to revise the legal sentence passed by a Special magistrate under the Bengal Suppression of Terrorist Outrages Act, any appeal from or revision of which class of sentence is barred by Sec. 5 of the Bengal Suppression of Terrorist Outrages (Supplementary) Act. (*Cunliffe & Henderson J. J.*)

MADAN MOHAN ROY vs. EMPEROR.

40 C. W. N. 735

BIHAR & ORISSA EXCISE ACT (II OF 1913)

Secs. 47 & 87—*Magistrate discovering certain articles in connection with a liquor shop reporting to police for investigation—Sub-Inspector treating same as first information and submitting charge-sheet—consequent conviction of accused Legality of.*

A Magistrate coming to know that the Manager of a license-holder of a liquor shop was doing business at a certain hat went to the locality and there finding certain articles in the house of a Choukidar ordered the Sub-Inspector to take up investigation. The Sub-Inspector treated this as a first information and submitted a charge-sheet against the manager of the liquor shop who was convicted under Sec. 47A of the Bihar & Orissa Excise Act. *Held*, that the cognisance not having been taken on the magistrate's own knowledge and suspicion or on the complaint or report of an Excise officer, the whole proceeding was bad in law and the conviction was liable to be set aside. (*Rowland J.*)

SHEONANDAN RAM vs. EMPEROR.

17 P. L. T. 105

Sec. 180—*Platform extending over municipal drain in contravention of the provision of Sec. 180 (2)—defence that the platform is an old one—liability of the owner.*

Sub-section 2 of Sec. 180 of the Bihar & Orissa Municipal Act requires the owners of every platform "except platform used in giving such access to the honour the Commissioner may consider necessary" to take out a license for keeping the platform if the Commissioners at a meeting so direct. This subsection contains nothing

Bihar & Orissa Excise Act (Contd.)

to distinguish between the cases of new platforms and old platforms and the intention appears to be that while old platforms will be allowed to be retained, their owners must take out license and if they do not do so they are liable to be convicted under Sec. 180 (5) of the Act. (*Rowland J.*)

GHADSIRAM vs. VICE-CHAIRMAN, SAMBALPUR MUNICIPALITY.

17 P. L. T. 148

Sec. 194—*Order directing owner to demolish a structure and not giving him the alternative course of repairing—legality of the order.*

Where the owner of a holding was served with a notice under Sec. 194 of the B.O. Municipal Act directing him to demolish a certain structure which was in a dangerous condition, but the order did not give him the alternative of repairing the same, even though the words used in the Act were "to demolish, secure or repair such building," *held*, that the notice was not contrary to law. (*Dhavl & Rowland JJ.*)

DWARKA MAHTON vs. PATNA CITY MUNICIPALITY.

17 P. L. T. 123

BIHAR & ORISSA MUNICIPAL ACT (VII OF 1922)

Secs. 194 & 360—*Question whether building is in such dangerous condition—to require demolition, by whom to be decided.*

Under the Bihar & Orissa Municipal Act, 1922, it is for the Municipality to decide not only whether a building is in a ruinous condition or is dangerous to person or property, but also whether demolition is necessary or repairs would suffice. The decision of the Municipality is not one to be questioned in the Courts, but the rate-payer is not absolutely helpless for he has the alternative of preferring an objection under Sec. 360 of the Act. Therefore, it is not necessary for the legality of an order under Sec. 194(1) (ii) of the B & O. Municipal Act, that the building should be found by the Courts to have been in a ruinous condition and dangerous to persons or property. (*Dhavl & Rowland JJ.*)

DWARKA MAHTON vs. PATNA CITY MUNICIPALITY.

17 P. L. T. 123

BURMA PREVENTION OF CRIMES (YOUNG OFFENDERS) ACT II OF 1910.

Secs. 10 & 25 (1)—*Order of imprisonment for a certain term by trial court—order by appellate Court for detention in Borstal school for a longer period: if amounts to enhancement of sentence.*

Under Sec 10 of the Burma Prevention of Crimes (Young Offenders) Act, a Court of Session, in appeal, has jurisdiction to order detention in a Borstal School for any period which is legal under the provisions of Sec. 25 (1) of the Act, irrespective of the length of the sentence of imprisonment which has been passed by the Magistrate from whose judgment the appeal is brought, and in ordering such detention there can be no question of an enhancement of sentence having been made. (*Dunkley J.*)

EMPEROR vs. AH HTWA.

14 Rang. 119 = A. I. R. 1936 Rang. 327
= 163 I. C. 74 = 37 Cr. L. J. 790 = 1936 Cr. C 517

Secs 11, 13 & 25.—*Magistrate not empowered under Part II of the Act, trying offence and finding accused guilty, submitting proceedings to District Magistrate—order by District Magistrate, if appealable.*

A Magistrate not invested with powers under Part II of the Burma Prevention of Crime (Young Offenders) Act, tried a case of arson, and finding the accused guilty, submitted the proceedings to the District Magistrate under Sec. 11 of the Act. The District Magistrate, acting under Sec. 25 (1) of the Act, ordered the accused to be detained in a Borstal School for four years. Held, that the order of the District Magistrate was appealable, and the appeal lay to the Court of Session. (*Mosely J.*)

NGA AUNG THIN & ANR. vs. EMPEROR.

14 Rang. 78

Sec. 13—*Order directing accused to be detained in Borstal School—appeal from such order, where lies.*

In respect of an order of detention in a Borstal School for any period passed by a Magistrate, there is under section 13, Burma Prevention of Crime (Young Offenders) Act, a right of appeal to the local Court of Session, and the only circumstances in which the appeal against such an order will

Burma Prevention of Crime Act (Contd.)

lie to the High Court, is when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding 4 years. In such a case the appeal will lie to the High Court under the provisions of proviso (b) to Sec. 408, Cr. P. Code. (*Dunkley J.*)

JA NA THA E & ANR. vs. EMPEROR.

14 Rang. 143 = A. I. R. 1936 Rang. 229

Sec 24 (b)—*"Beyond age of 18"—Meaning of.*

The expression "beyond the age of eighteen" in clause (b) of Sec. 24 of the Burma Prevention of Crime (Young Offenders) Act means and includes the period up to the 19th birthday of the person. A Magistrate passing an order of detention under the Act must ascertain the exact age of the accused. A person who is just under sixteen years of age at the time of passing the order can be ordered to be detained for a period of three years under Sec. 24 (b) of the Act. (*Dunkley J.*)

EMPEROR vs. NGA BALA.

14 Rang. 327 = A. I. R. 1936 Rang. 297
= 163 I. C. 1008 = 37 Cr. L. J. 869,

Sec. 25 (1)—*Accused found guilty of murder, if can be sent to Borstal School.*

Sec. 25 (1), Burma Prevention of Crimes (Young Offenders) Act, only allows an order directing an accused who is between 16 & 19 years of age to be sent to Borstal School, only in cases where a sentence of imprisonment would ordinarily be passed. An offence under Sec. 302, Penal Code, is not punishable with imprisonment, but with death or transportation for life. An order under Sec. 25 (1), directing an accused, aged 16, found guilty under Sec. 302 & 307, Penal Code to be sent to a Borstal school for 7 years, is therefore illegal. (*Mosely & Ba U, JJ.*)

EMPEROR vs. NGA U.

A. I. R. 1936 Rang. 234 = 163 I. C. 118
= 37 Cr. L. J. 791 = 1936 Cr. C. 518

BURMA VILLAGE ACT (VI OF 1907).

Secs. 8, 11 (d) & 12—*Refusing to help*

Burma Village Act (Contd.)

headman to despatch injured person to hospital, if an offence.

The public duties of a headman under the Burma Village Act are enumerated under Sec. 8 of the Act and there is nothing in that Section or any where else to show that it is the public duty of a headman to despatch an injured person to hospital. Therefore the refusal of a villager to help the headman to carry the injured person to hospital is not an offence within the meaning of Sec. 12 (ii) read with Sec. 11 (d). (*Mosely, J.*)

EMPEROR vs. MAUNG THA DIN.

A. I. R. 1936 Rang. 120 = 161 I. C. 604
= 1936 Cr. C. 195 = 37 Cr. L. J. 468

Sec. 10—“Abuse of power”—meaning of.

An ‘abuse of power’ means that when a person has power to do a certain thing, he exercises that power in a manner in which authority is not given to him to exercise it. (*Dunkley J.*)

MAUNG BA SHIN vs. EMPEROR.

A. I. R. 1936 Rang. 11 = 160 I. C. 477
= 37 Cr. L. J. 295 = 1936 Cr. C. 4

Secs. 10 & 28—Complaint against headman—act complained of punishable departmentally—sanction of Dy. Commissioner, if necessary.

Sec. 28, Burma Village Act refers to a complaint of an act which constitutes an offence under the Indian Penal Code or any other law, if such act is also punishable departmentally under Sec. 10 of the Act. Where the question for consideration is whether the act complained of is also punishable departmentally by the Dy. Commissioner under Sec. 10 of the Act then the sanction of the Dy. Commissioner to the prosecution is necessary. 24 Cr. L. J. 581 & 8 Rang. 654 relied on. (*Dunkley J.*)

MAUNG BA SHIN vs. EMPEROR.

A. I. R. 1936 Rang. 11 = 160 I. C. 477
= 37 Cr. L. J. 295 = 1936 Cr. C. 4

CALCUTTA IMPROVEMENT ACT (V OF 1911).

Sec. 171—Re-erect, meaning of—

Calcutta Improvement Act (Contd.)

Term if bears special meaning as in Calcutta Municipal Act or ordinary meaning.

The word “re-erect” in Sec. 171 of the Calcutta Improvement Act does not bear the special meaning given thereto in Sec. 3(33) of the Calcutta Municipal Act, 1893, but must be understood in its ordinary meaning. When re-erection within the ordinary meaning of the term and unauthorised, has been found as a fact, the liability to conviction is established. (*Jack J.*)

ADITENDRA NATH MITTRA & ORS. vs. BHUPATI BHUSAN SEN GUPTA.

40 C.W.N. 799 = 63 C.L.J. 582 = 1936 Cr. C. 646 = A. I. R. 1936 Cal. 373

Sec. 171—Total fine inflicted on several persons if may exceed Rs. 500 -

When more persons than one are convicted for joining in the erection of a building, and are fined, the fact that the total fine imposed exceeds Rs. 500 -, does not render the sentence illegal, because under the Section, each of such persons is clearly liable to a fine extending up to Rs. 500/- (*Jack J.*)

ADITENDRA NATH MITTRA vs. BHUPATI BHUSAN SEN.

40 C. W. N. 799 = 63 C. L. J. 582
= 1936 Cr. C. 646 = A. I. R. 1936 Cal. 373.

CALCUTTA MUNICIPAL ACT. (III OF 1923)

Sec. 175—Trade, meaning of—trading license, basis of provision for—place where profits made or received, if material.

“Trade” in Sec. 175, Calcutta Municipal Act is used in its ordinary sense, that is exchange of goods for money or goods for goods with the object of making a profit.

The provision for taking out a license is intended to control the carrying on of a trade : it is not meant to be a tax on the profits and accordingly the place where the profits are made or received is not material. (*Jack J.*)

BURMAH SHELL OIL STORAGE & DISTRIBUTING CO., LTD., vs. HOWRAH MUNICIPALITY.

40 C. W. N. 766

Calcutta Municipal Act (Contd.)

Sec. 175 (extended to Howrah) & Sch. VI—Company with Head Office in Calcutta and storage godown in Howrah—goods being delivered from latter under contracts made in former, if carries on trade in Howrah—business in Howrah if auxiliary to Calcutta business in the sense of Cl. 5 of Sch. VI—Such Company, if must take out trading license from Howrah Municipality.

A Company having its head quarters in Calcutta and a branch establishment at Howrah in the form of a storage godown and carrying on business under the system that orders are received at Calcutta and goods are delivered from the godown in Howrah under instructions from the Calcutta office, carries on a trade in Howrah within the meaning of Sec. 175 of the Calcutta Municipal Act as extended to Howrah. Such storage and delivery of goods in Howrah is not auxiliary to the business in Calcutta within the meaning of Sch. VI, Cl. 5, of the Act which provision applies only to trade carried on at different premises within one municipality. Accordingly such a Company is liable to take out a trading license from the Howrah Municipality if the further requisites mentioned in the Sch. VI, of the Act are present. (*Jack J.*)

BURMAH SHELL OIL STORAGE & DISTRIBUTING CO., LTD., vs. HOWRAH MUNICIPALITY.

40 C. W. N. 766

Sec. 271—"Premises", meaning of—Owner of land who is not owner of building standing thereon, if liable to conviction, for non-compliance with requisition as to sanitary accommodation—Requisition on whom to be served. (*Jack J.*)

"Premises" under Sec. 271 of the Calcutta Municipal Act, means the building and not the land. Consequently, when the owner of the land and the owner of the structures standing thereon are different persons, the requisitions under the section must be served upon the latter—at any rate, primarily even if premises means both lands and buildings. If when the requisition is served only on the owner of the land, he is not liable to conviction for non-compliance therewith. (*Jack J.*)

MST. KHAIRUNNESA BIBI vs. CORPORATION OF CALCUTTA.

40 C. W. N. 797

Calcutta Municipal Act (Contd.)

Sec. 534—Limitation for prosecution under the Section.

Where the Corporation seeks to prosecute a person under Sec. 488 of the Calcutta Municipal Act, and there is nothing on the record to show the date on which the offence committed was first brought to its notice, the onus lies on the Corporation to prove that the proceedings are commenced within the period prescribed by law. (*Guhla & Bartley JJ.*)

CORPORATION OF CALCUTTA vs. GANESH CH. DHUR.

1936 Cr. C. 111=A. I. R. 1936 Cal. 20

CALCUTTA POLICE ACT (IV OF 1806)

Sec. 3—Guins contemplated by the section—room where one bets with another, hoping to make profit, if common gaming house.

In order that a place may be a "common gaming house" as contemplated by Sec. 3 of the Calcutta Police Act, the person owning, occupying, using or keeping the place must make or expect some profit otherwise than as a result of betting by him—such as, for example, an admission fee or commission or income from his proprietary club where gaming takes place (*Henderson & R. C. Mitter JJ.*)

RANGA LAL SEN & ORS. vs. EMPEROR.

41 C. W. N. 123=A. I. R. 1936 Cal. 788

Secs. 3 & 45—Accused, if liable to be convicted for accepting marked currency note to put on certain horses.

The accused was found to have accepted a marked five rupee note to put on certain horses. The only other incriminating article found was a racing book. Held, that the mere acceptance of the marked five rupee note was not sufficient to establish the guilt of the accused under Sec. 45, Calcutta Police Act, nor was the evidence sufficient to show that the place was a common gaming house within the meaning of Sec. 3 of the Act. (*Jack J.*)

HARI CHARAN BANERJEE vs. EMPEROR.

37 Cr. L. J. 851=1936 Cr. C. 582=A. I. R. 1936 Cal. 355

Calcutta Police Act (Contd.)

Sec. 46—*Warrant in compliance with section—presumption of legality, if may be drawn—Crown proving receipt of information on oath and making of enquiry, if required to prove any further fact.*

When the search warrants issued under Sec. 46 Calcutta Police Act is in proper form, reciting receipts of information on oath, making of enquiry and existence of reason to believe that the place concerned is a common gaming house, the Court may, even in the absence of further evidence, presume under Sec. 114, illus (e) of the Evidence Act, that the warrant was a legal warrant. At any rate, the crown has only to show, by evidence, that the warrant was issued by the relevant authority upon information in oath and after making such enquiry as it deemed necessary. When such evidence is given the crown is not required to prove any further fact and it is not open to the court to go behind the warrant in order to see what inference might be based on the information, (*Henderson & R. C. Mitter JJ.*)

RANGALAL SEN & ANR. vs. EMPEROR.

41 C. W. N. 123=A. I. R. 1936 Cal. 789

Sec. 47—*Effect of the section—Section, if creates presumption to be rebutted by accused to avoid conviction.*

Sec. 47 of the Calcutta Police Act, only creates a special rule of evidence, making something evidence which would not otherwise be so. The Magistrate may convict upon it or may consider it insufficient.

Per R. C. Mitter: J. Sec. 47 only raises a presumption of fact. The finding of materials mentioned in the section as evidence that the place is a common gaming house, the effect of which evidence may be nullified by other evidence on the record. (*Henderson & R. C. Mitter JJ.*)

RANGA LAL SEN & ANR. vs. EMPEROR.

41 C. W. N. 123=A. I. R. 1936 Cal. 788

CANTONMENTS ACT (II OF 1924).

Sec. 236 (1)—*Pimp, if liable to be prosecuted.*

A pimp is liable to be prosecuted under Sec. 236(1), Cantonment Act, just as

Cantonment Act (Contd.)

well as the woman who was to be the subject of prostitution. There is nothing in the wording of the section which says that the person importuning must imparture to the commission of sexual immorality with himself or herself A. I. R. 1936 Bom. 227 relied on. (*All-sop & Ganganath JJ.*)

EMPEROR vs. NARAIN KOCHI

1936 A. W. R. 115=160 I. C. 884
=37 Cr. L. J. 372=1936 A. L. J. 193
=1936 Cr. C. 132=A. I. R. 1936 All 129

CENTRAL PROVINCES BORSTAL ACT (IX OF 1928)

Sec. 5(1) & 10—*Detention in a Borstal institution for second time, if permissible.*

Under Sec. 10 of the C. P. Borstal Act, a person who has once been detained in a Borstal institution and has served his term of detention cannot be ordered to be detained again. Such an order of detention is illegal and is liable to be set aside and an order of imprisonment passed instead. (*Bose J.*)

EMPEROR vs. RAM CHAND.

19 N. L. J. 162

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929).

Marriage contravening provisions of the Act, if invalid.

The Child Marriage Restraint Act, 1929 merely imposes certain penalties on persons bringing about marriages in contravention of the provisions of the Act, but the marriage of a child is not declared by the Act to be an invalid marriage. (*Thom J.*)

MOTI vs. BENI.

1936 A. W. R. 920=1936 A. L. J. 1097
=1936 Cr. C. 1111=A. J. R. 1936 All. 852

Sec. 5—*Performance of Gauna ceremony if essential for completion of marriage.*

The fact that the Gauna Ceremony has not been performed as yet does not affect the performance of the marriage which is complete as soon as the ceremony of the marriage is performed. Consummation is not a part of the marriage ceremony. (*Ganga Nath J.*)

MUNSHI RAM & ANR. vs. EMPEROR.

58 All. 402

Child Marriage Restraint Act (Contd)

Secs. 5 & 6—Provisions of the two sections—distinction between.

Secs 5 & 6 of the Child Marriage Act 1929 deal with different offences. Sec. 5 deals with the persons who perform, conduct or direct any child marriage. Sec. 6 provides for the offence in a case where a minor herself contracts a child marriage. It is only in the case a minor contracts child marriage that any person having charge of the minor whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized shall be punishable. Sec. 5 deals with the cases in which the marriage is not contracted by a minor. The section is wide enough to cover the case of the fathers of both the bridegroom and the bride, and it cannot be said that it relates merely to priests and strangers and not to the parents. (*Ganganath J.*)

MUNSHI RAM & ANR vs. EMPEROR.

1936 A. W. R. 1150

Sec. 6—Provisions of the Act if applicable to marriages solemnized outside British India.

The Child Marriage Restraint Act, 1929 is limited in its operation to British India and only strikes at marriages contracted in British India. A Child Marriage contracted outside British India is not an offence under the Act. (*Beaumont C. J. & N. J. Wadia J.*)

NARAYAN MUDLAGHRA MAHALE vs. EMPEROR.

59 Bom. 745

Sec. 11—Security bond defective—Trial, if vitiated.

The mere fact that a security bond furnished by a person as required by Sec. 11 of the Child Marriage Restraint Act. is found to be defective, does not vitiate the trial, because, it does not in any way affect the merits of the case or occasion a failure of justice. (*King C. J.*)

BECHU LAL & ORS. EMPEROR.

1936 O. W. N. 480 = 162 I. C. 389 (2)
= 36 Cr. L. J. 616 = 1936 Cr. C. 712
= A. I. R. 1936 Oudh 311

CONTEMPT OF COURT.

High Court's power to commit for contempt—principles on which such orders should be made.

The High Court has an inherent power to punish for contempt and in exercise of its power, which is in no way restricted by the Codes of Civil or Criminal Procedure, may send a special bailiff to arrest a person at a place within its general jurisdiction. The powers of the Court however, in such matters should be jealously and carefully watched and exercised and such an order ought only to be made in the rarest case e.g., where a party fails to comply with the orders of the Court and treats with scant courtesy the persons sent to him under orders of the Court, and in terms of a decree to which he is a consenting party. (*Mc Nair J.*)

CHANDANMULL KARNANI vs. SARDARILAL TUAPAN.

40 C. W. N. 1285

High Court's power to commit for contempt—exercise of the power, if limited within the general jurisdiction of the Court.

In case of contempt, the High Court may, acting under its inherent powers, send a special bailiff to arrest a person at a place within its general jurisdiction. It has however no power to arrest for contempt a person in any part of British India which is outside its general jurisdiction. The spirit of mutual assistance and co-operation existing between the various courts in British India can however make the enforcement of such orders effectual outside the general jurisdiction of the High Court issuing the order. (*Mc Nair J.*)

CHANDANMULL KARNANI vs. SARDARILAL TUAPAN.

40 C. W. N. 1285

Order of Court of Record punishing for contempt—Appeal to Privy Council, if lies.

It is competent to the Privy Council to give leave to appeal and to entertain appeal from orders of the Court overseas imposing penalties for contempt of Court, even though they be Courts of Record. But acts which amount to contempt of Court are quasi-criminal acts and leave to appeal from orders punishing such acts is only to be

Contempt of Court (Contd.)

granted on the principles on which leave to appeal in criminal cases is granted. (*Lord Atkin*.)

ANDRE PAUL TERRENCE AMBARD
vs. ATTORNEY-GENERAL OF TRINIDAD
& TOBAGO.

40 C. W. N. 801 = 38 P. L. R. 541
= 1936 A. L. J. 671 = 162 I. C. 92 =
44 M. L. W. 15 = 1936 A. W. R. 600
= 38 Bom. L. R. 681 = 71 M. L. J. 665
= 1936 M. W. N. 619 = 64 C. L. J. 36
= A. I. R. 1936 P. C. 141.

Order of Court of Record punishing for contempt—Appeal to Privy Council—Such Court, if may itself grant leave.

Where the provisions relating to the jurisdiction of a Court of Record imposes no limit other than pecuniary as to the orders passed by it, from which there may be an appeal, such Court may itself grant leave to appeal to the Privy Council from an order punishing for contempt of Court. (*Lord Atkin*.)

ANDRE PAUL TERRENCE AMBARD
vs. ATTORNEY GENERAL OF TRINIDAD
& TOBAGO.

40 C. W. N. 801 = 38 P. L. R. 541
= 1936 A. L. J. 671 = 162 I. C. 92
= 44 M. L. W. 15 = 1936 A. W. R. 600
= 38 Bom. L. R. 681 = 1936 M. W. N. 619
= 64 C. L. J. 36 = A. I. R. 1936 P. C. 141
= 71 M. L. J. 665

Appeal to Privy Council in contempt cases—Limits of and principles on which to be entertained.

Where there has been a misconception of the doctrine of contempt of Court as applied to public criticism and the jurisdiction to punish for contempt has been applied in a case to which it was not properly applicable, there is a substantial miscarriage of justice which justifies the entertainment of an appeal. (*Lord Atkin*.)

ANDRE PAUL TERRENCE AMBARD
vs. ATTORNEY-GENERAL OF TRINIDAD
& TOBAGO.

40 C. W. N. 801 = 38 P. L. J. 541
1936 A. L. J. 671 = 162 I. C. 92
44 M. L. W. 15 = 1936 A. W. R. 600
= 38 Bom. L. R. 681 = 1936 M. W. N.
619 = 64 C. L. J. 36 = A. I. R. 1936 P. C.
141 = 71 M. L. J. 665.

Obstruction of Receiver—procedure for moving for contempt of Court.

Contempt of Court (Contd.)

When after the appointment of a Receiver at the instance of the plaintiff the former's possession is obstructed or disturbed, the proper procedure for moving for contempt of Court is that the plaintiff rather than the Receiver should move the Court and when the Receiver is the plaintiff himself, he should move in the capacity of the plaintiff. (*Lord Williams & Jack J.*)

NARAIN CHANDRA CHATTERJEE vs.
PANCHOO PARAMANICK,

40 C. W. N. 413

Charge of contempt for obstruction of Receiver—defence of bonafide belief in right to possession, if available.

When the accused charged with contempt of Court for disturbing the possession of the Receiver had knowledge that a Receiver had been appointed by the Court and possession of the property had been given to him against themselves, it is no defence to say that they believed themselves, to be in rightful possession. (*Lord Williams & Jack J.*)

NARAIN CHANDRA CHATTERJEE vs.
PANCHOO PARAMANICK.

40 C. W. N. 413

Facts that must be proved to sustain a charge of contempt of Court for deliberately withholding documents.

When an application is made to commit a person for contempt of Court on the ground of his deliberately withholding documents which he has been ordered by the Court to produce, the applicant must prove, in order to establish the charge of contempt, that the documents are in the possession of the person charged, and have been deliberately withheld by him. Mere suspicion, although very deep, is not sufficient to establish a charge of contempt of Court. (*McNair J.*)

SITARAM KHEMKA vs. ARTHUR CHARLES THOMAS.

A. I. R. 1936 Cal. 132 = 161 I. C. 738

Free, fair and temperate criticism of any judicial act, if offence when unaccompanied by malice or attempt to undermine administration of justice or attribution of improper motive.

Contempt of Court (Contd.)

Where the authority and position of an individual judge or the due administration of justice is concerned, every member of the public (and so the press) has the right of criticising in good faith but freely in private or public, the public acts done in the seat of justice, provided he does not impute improper motives and does not act in malice or attempt to impair the administration of justice. (*Lord Atkin*).

ANDRE PAUL TERRANCE AMBARD
vs. ATTORNEY-GENERAL OF TRINIDAD
& TOBAGO.

40 C. W. N. 801 = 38 P. L. R. 541 = 1936
A. L. J. 671 = 1621, C. 92 = 44 M. L. W.
15 = 1936 A. W. R. 600 = 38 Bom. L. R.
681 = 1936 M. W. N. 619 = 64 C. L. J. 36.
= A. I. R. 1936, P. C. 141 = 71 M. L. J. 665

Contrasting two sentences passed in two similar cases by different Judges as an illustration of thesis that the human element plays a part in awarding sentences, if contempt of Court.

The writer of a newspaper article took for his theme a topic of inequality of sentences and by way of illustration contrasted two recent sentences in similar cases by two judges of the same Court representing them as relatively too severe and too lenient, though by itself he thought neither could be regarded as a lenient sentence. His conclusion was that the human element came into play in awarding punishment, that is to say, sentences varied in apparently similar circumstances with the habit of mind of particular judge; and he expressed a wish for some means to be found for a greater equalisation of punishment. He stated no untruth and did not intentionally misstate the law; and an inaccuracy he committed in stating the findings of the Court did not affect the reasoning as to the unevenness of the sentence. *Held* that the article was within the limits of free and fair criticism. There was nothing in it or in other facts to justify the finding that it was written with the direct object of bringing the administration of criminal law into disrepute or that it could have that effect. (*Lord Atkin*)

ANDRE PAUL TERRANCE AMBARD
vs. ATTORNEY-GENERAL OF TRINIDAD
& TOBAGO.

Contempt of Court (Contd.)

40 C. W. N. 801 = 38 P. L. R. 541 = 1936
A. L. J. 671 = 1621, C. 92 = 44 M. L. W.
15 = 1936 A. W. R. 600 = 38 Bom. L. R.
681 = 1936 M. W. N. 619 = 64 C. L. J. 36
= A. I. R. 1936, P. C. 141 = 71 M. L. J. 665.

CONTEMPT OF COURTS ACT (XII OF 1926).

Sec. 2(3)—*Contempt of Subordinate Court punishable by Penal Code not as contempt but as other offence, if excluded from jurisdiction of High Court.*

Under Sec. 3 (3) of the Contempt of Court Act, only those contempts which are punishable by the Penal Code as contempts of Court are excluded from the jurisdiction of the High Court, but contempts which are punishable as ordinary offences are not. 12 Pat. 173 followed. (*Lord Williams & Jack JJ.*)

NARAIN CH. CAATTERJEE vs. PANCHOO PARAMANICK.

40 C. W. N. 413

CRIMINAL PROCEDURE CODE (V OF 1898).

Secs. 30 & 250—*Magistrate invested with special power trying complaint under Sec. 376. Penal Code discharging accused and directing payment of compensation under Sec. 250—Order directing payment of compensation, if legal.*

Under Sec. 250, Cr. P. Code a magistrate can pass an order awarding compensation if he is able to dispose of the case personally. A Magistrate invested with special power under Sec. 30, Cr. P. Code, trying a complaint under Sec. 376, Penal Code, and passing an order discharging the accused, is therefore entitled to pass an order awarding compensation to the accused under Sec. 250, notwithstanding the fact that the offence under consideration is exclusively triable by the Court of Session. 66 I. C. 518 & 49 I. C. 176 dissented from; 19 Bom. L. R. 60, 48 All. 166 & 45 Mad. 29 distinguished (*Baguley & Mosley JJ.*)

MA SIN vs. MAUNG LAW & ANR.

14 Rang. 378 = 37. Cr. L. J. 773 = 1936
Cr. C. 514 = A. I. R. 1936 Rang. 230
= 163 I. C. 163.

Sec. 37 & Sch. 3 & 4—*Power of Magistrate to take cognisance of an offence on his own knowledge or suspicion.*

Criminal Procedure Code (Contd)

A reference to the third schedule of the Cr. P. Code shows that the power to take cognisance of an offence on his own knowledge or suspicion is not one of the ordinary powers of a Magistrate of the first class. It is a power with which a Magistrate of the first class may be invested by the Local Government under Sec. 37 of the Code read with Sch. 4. (*Rowland J.*)

SHEONANDAN RAM vs. EMPEROR,
17, P. L. T. 105.

Sec. 54—Arrest without warrant, when permissible.

Sec. 54 Cr. P. Code authorises the arrest without warrant, firstly, of a person concerned in a cognisable offence or credibly alleged to have been so concerned, and secondly, of a person who has been proclaimed as an offender under the Code. It does not apply when the offence for which a person is wanted is a non-cognisable offence. (*Rowland J.*)

RAGHUNI PROSAD MAHTO & ORS vs. EMPEROR.

17 P. L. T. 81 = 37 Cr. L. J. 318 = 1936 Cr. C. 273 = A. I. R. 1936 Pat 249 = 160 I. C. 604.

Secs. 54 & 56.—Arrest by police constable of person concerned in cognisable offence—such arrest if legal.

A constable can arrest a person suspected of having committed a cognisable offence, even without a written order of a superior officer when a complaint has been made to the superior officer. The arrest is justified by Sec. 54 Cr. P. C. which is not controlled by Sec. 56. (*Broomfield & Wassoodew J. J.*)

EMPEROR vs. KESHAVLAL.

38 Bom. L. R. 971

Secs. 54 & 56—Extent of power of a police officer to arrest without warrant.

Sec. 54, Cr. P. Code does not give unqualified power to a police officer to arrest without written authority, a person concerned in a cognisable offence. A police officer may exercise such power only when he is acting on his own initiation or independently in the course of his duty. But where a subordinate police officer is not acting independently, but under orders of a superior

Criminal Procedure Code (Contd)

officer, he must be given his order to arrest, in writing by the superior officer. The superior officer must notify to the person to be arrested the substance of the order, and if so required by such person, show him the order. (*Mosley J.*)

MOHAMMED ISMAIL vs. KING EMPEROR.

13 Rang. 754.

Sec. 55—Duty of police making arrest under the provisions of the section.

It is not the duty of the police, on making an arrest under Sec. 55 Cr. P. Code, to release the arrested persons on bail immediately after the arrest has been made or to inform the person arrested that he is entitled to be released on bail. (*Lort Williams & Jack J.J.*)

SUPDT. & REMEMBRANCE OF LEGAL AFFAIRS, BENGAL vs. JAHIR ALI.

63 Cal. 189. = 164 I. C. 1007 = 37 Cr. L. J. 1070.

Sec. 87 (3)—Publication or service of proclamation—Essentials.

Cl. 3 of Sec. 87, Cr. P. Code is only applicable when a statement in writing by the Court specifies the date on which the proclamation was published. Where this is not done, recording of such an order will not suffice to take the place of direct evidence of publication and service of the proclamation. (*Rowland J.*)

RAGHUNI PROSAD MAHTO & ORS vs. EMPEROR.

17 P. L. T. 81 = 160 I. C. 604 = 37 Cr. L. J. 318 = 1936 Cr. C. 273 = A. I. R. 1936 Pat 249.

Sec. 94—Right of accused to get departmental enquiry papers.

Sec. 94 Cr. P. C. gives the Magistrate discretion about production of departmental enquiry papers, which can be interfered in revision if the High Court thinks that the discretion was not exercised judicially. (*Gruer J.*)

CHOTEY MIAN vs. EMPEROR.

A. I. R. 1936 Nag. 250

Sec. 94 (3)—Police officer conducting investigation, if entitled to inspect Banker's Books.

Criminal Procedure Code (Contd.)

Sec. 94 (3), Cr. P. Code, does not except Banker's Books from production before the Police. An officer in charge of a police station conducting an investigation, is therefore, entitled to inspect them even without an order of court. (*Skemp J.*)

PRICE *vs* EMPEROR.

17 Lah. 593 = 38 P. L.R. 1042.

Sec. 99A—*Scope and essentials—Passages in a book creating distant feeling and disaffection but not having effected by actual promotion of ill-feeling or hatred—Effect of.*

To make Sec. 99A Cr. P. Code applicable two things are necessary :— (1) Promotion of feelings of enmity or hatred and (2) between different classes of subjects. The section does not contemplate the penalising of political doctrines even though of extreme kind like communism, but merely such writings as has directly promoted feelings of hatred or enmity. Passages in a book might be construed to create some distant feeling of disaffection against the rich and the wealthy, but if they have not the direct effect of actual promotion of any ill-feeling or hatred, it cannot be said that the book contains objectionable matter within the scope of Sec. 153A, Penal Code. Where, however, the translation of an old manifesto directly aims at promoting class hatred and enmity and in fact incites working class to overthrow the capitalist class even with the use of force, it undoubtedly contains matter which is objectionable under Sec. 153A, Penal Code. (*Sulaiman, C. J., Allsop & Bajpai, JJ.*)

M. L. GOUTAN *vs* EMPEROR.

1936 A. L. J. 786 = 1936 A. W. R. 638
= A. I. R. 1936 All. 561 = 164 I. C. 253
= 37 Cr. L. J. 943 = 1936 Cr. C. 739.

Sec. 99A—*Scope of the section if wider than that of Sec. 153 (a), Penal Code.*

The scope of Sec. 99 (a), Cr. P. Code is wider than that of Sec. 153 (a), Penal Code, because "intention" falls short of "attempt" and has in addition been made an alternative ground for an action under the former section. (*Sulaiman, C. J., Thom & Niamatullah JJ.*)

M. L. C. GUPTA *vs* EMPEROR.

Criminal Procedure Code (Contd.)

1936 A. W. R. 227 = 1936 A. L. J. 165
= 1936 Cr. C. 480 = 37 Cr. L. J. 599
= A. I. R. 1936 All. 314 = 162 I. C. 507

Sec. 99B—*Application under the section—Right of opening case and of replying.*

In an application under Sec. 99 (B), Cr. P. Code it is the applicant who has to make out a case in his favour and to show that the book in respect of which the Local Government's order was made did not contain any seditious matter or other matter referred to therein. Accordingly, it is the Counsel for the applicant who has the right to open the case and then would have the final right to reply. (*Sulaiman, C. J., Thom & Niamatullah, JJ.*)

M. L. C. GUPTA *vs* EMPEROR.

1936 A. W. R. 227 = 1936 A. L. J. 169
= 1936 Cr. C. 480 = 37 Cr. L. J. 595
= A. I. R. 1936 All. 314 = 162 I. C. 507

Sec. 100—*Warrant issued under the section—Duty of police officers to whom the warrant is sent for execution.*

The contention that if the police officer to whom the warrant under Sec. 110, Cr. P. Code for search of a person is issued for execution, finds that the person in question is not confined so as to make the confinement an offence, he should refrain from executing the warrant, has no force. The section lays down that it is for the magistrate to find whether there are reasons for believing that a person is in wrongful confinement and if he is so satisfied and issues a search warrant, the police officer to whom the warrant is addressed, has merely to execute it according to its tenor. (*Niamatullah, J.*)

KAILAN BEG & ORS. *vs* EMPEROR.

1936 A. W. R. 223 = 1936 A. L. J. 468
= 37 Cr. L. J. 548 = 1936 Cr. C. 459 = A. I. R. 1936 All. 306 = 162 I. C. 339(2)

Sec. 103—*Object of the section.*

The provisions of Sec. 103, Cr. P. Code are enacted for greater certainty and security, and not because the statements of certain officer can under no circumstances be accepted. (*Mackney J.*)

EMPEROR *vs* MA THEIN.

A. I. R. 1936 Rang. 15 = 160 I. C. 816
37 Cr. L. J. 331 = 1936 Cr. C. 21

Criminal Procedure Code (Contd.)

Sec 106—*Security bond to keep peace—liability of surety.*

Where a bond is executed under Sec. 106, Cr. P. C. with a surety and the person bound commits a breach of the peace, the liability of the surety to pay the amount payable under the bond is independent of that of the accused. (*Young C. J. & Monroe J.*)

SARDAR KHAN vs. THE CROWN

17 Lah. 523 = 38 P. L. R. 951

Sec. 107.—*Scope thereof—question of title if relevant.*

In an enquiry under Sec. 107 Cr. P. Code, the right to possession of articles seized was irrelevant. The only point for determination in that enquiry is the likelihood of a breach of peace. (*Bose J.*)

RANI SONA BOHU vs. RAO SOBHAQ SINGH,

19 N. L. J. 264

Secs. 107, 144 & 145.—*Scope of the sections,*

Sec. 144, Cr. P. Code is of general application and contains nothing which ousts the magistrate's jurisdiction, in cases of bonafide disputes as to possession of land. But where Sec. 107 or 145 will meet the requirements of the case, Sec. 144 is not an appropriate remedy, and if it is found that the danger was not so imminent that it could be otherwise averted, an order under Sec. 144, will generally be held to have been made without jurisdiction. (*Rowland J.*)

JAGURPA KUMARI vs. CHQTEY NARAIN SINGH.

159 I. C. 455

Sec. 108.—*Person against whom proceedings under the section are contemplated, if must be within the jurisdiction of the local magistrate.*

An information was laid before the S. D. O. of Benetara in the shape of a complaint made by the Station house officer of Drug. The person complained against ordinarily resided within the jurisdiction of the magistrate at Benetara but he was at neither of these places on that date and the preliminary order under Sec. 112 had to be served on him at Nagpur. Held, that the

Criminal Procedure Code (Contd.)

mere fact that he was not within the local limits and jurisdiction when the order was passed did not make the order illegal. Even if there was any irregularity it was covered by Sec. 531, Cr. P. Code as no failure of justice was occasioned thereby. 54 All. 341 dissented from. (*Vivian Bose, J.*)

NARSINGH PRASAD vs. EMPEROR.

I. L. R. 1936 Nag 200 = 19 N. L. J. 183

Sec. 109.—*Action under the section, if justified on the mere ground that a man refuses to give his correct name.*

The mere fact that a man sought to be arrested foolishly tries to run away and declines to disclose his movements and chooses not to give his correct name is no ground for proceedings being drawn up against him under Sec. 109, Cr. P. Code, where it is clear that he is a man of position and substance. (*Nanavutti J.*)

DIN MOHAMMED vs. EMPEROR.

1936 O. W. N. 742

Sec. 110.—*Security for good behaviour if can be demanded from person not residing within jurisdiction.*

In order to confer jurisdiction on the Magistrate for proceeding under Sec. 110, Cr. P. C., it is not necessary that the person proceeded against must be a permanent resident within the local limits of his jurisdiction. 27 Cal. 993 dissented from; 36 Mad. 96. 16 Cal. 215, relied on. (*Coldstream J.*)

GHULAM HUSSAIN vs. THE CROWN.

17 Lah. 453 = 38 P. L. R. 905 = 165 I. C. 948.

Secs. 110 & 123.—*Proceedings under Sec. 110 transferred to Sessions Judge—Order by Sessions Judge directing that the accused should be allowed to examine further defence witnesses but not allowing prosecution witnesses to be further examined—Order, if proper.*

In proceedings under Sec. 110, Cr. P. Code, which were transferred to him, the Sessions Judge under Sec. 123, Cr. P. Code, passed an order directing that the plea of guilty made by the accused should be cancelled as it appeared that the plea was made by the accused on the impression that they would be let off easily on making a confession. The Sessions Judge further

Criminal Procedure Code (Contd.)

directed that the accused should be allowed to examine further defence witnesses, but he ordered that no further prosecution witnesses were to be examined. *Held*, that the order regarding the cancellation of the so-called plea of guilty was reasonable as it was really nothing more than a mere admission. But the order prohibiting the further examination of prosecution witnesses was improper and liable to be set aside. (*Cunliffe & Henderson JJ.*)

SUPERINTENDENT & REMEMBRANCER
OF LEGAL AFFAIRS BENGAL *vs.* JIBAN
KUMAR DEV & ORS.

A. I. R 1936 Cal. 292 = 163 I. C. 228
(1) = 37 Cr. L. J. 818 = 1936 Cr. C. 529

Secs. 110, 310 & 311—Security proceedings—previous conviction—strict proof, if necessary.

In proceedings under Sec. 110, Cr. P. Code, it is not necessary for the prosecution to prove a previous conviction of any person in the same formal manner as that required by Secs. 310 & 311 in respect of offences tried in the Sessions Court. (*Srinivasa & Narasimha JJ.*)

EMPEROR *vs.* BACHCHU,

1936 O. W. N. 247 = 37 Cr. L. J. 390 =
1936 Cr. C. 385 = A. I. R. 1936 Oudh
238 = 160 I. C. 1039.

Secs. 118, 226 & 498—Appeal by person bound over under Sec. 118—appellate court if can suspend execution of the order appealed against.

Sec. 426, Cr. P. Code does not apply to a person who has been bound over under Sec. 118, Cr. P. Code to be of good behaviour and who has preferred an appeal under Sec. 406 of the Code. In such a case, the appellate court has power under Sec. 498, Cr. P. Code to admit the appellant to bail, but that section does not empower the appellate court to pass an order under Sec. 425 suspending the execution of the order appealed against. (*Sulaiman C. J. & Bennet J.*)

MASURIA *vs.* EMPEROR.

1935 A. L. J. 1337

Secs. 118 & 498—Person bound over under Sec. 118 preferring an appeal—appellate court granting bail—period of bail

Criminal Procedure Code (Contd.)

if to be excluded from term for which order to be enforced.

Where a person who has been bound over under Sec. 118, Cr. P. Code is released on bail by the appellate court and his appeal is ultimately dismissed, the period during which he is released on bail should be excluded from the term prescribed under the order of the magistrate who bound him over. (*Sulaiman C. J. & Bennet J.*)

MASURIA *vs.* EMPEROR,

1935 A. L. J. 1337

Secs. 133, 137 & 142—Order passed under Sec. 142—Magistrate, if precluded from making any final order under Sec. 137 in respect of the same obstruction or nuisance.

An order under Sec. 133, Cr. P. Code was made calling upon the petitioner to show cause why a certain obstruction made by him should not be removed. The petitioner appeared to show cause, but before the date fixed for hearing, the magistrate made an order directing the petitioner immediately to remove the obstruction. Subsequently, he proceeded with the hearing and made a final order under Sec. 137, Cr. P. C. An objection having been taken that after an order was made under Sec. 142 and had been complied with, the magistrate was precluded from continuing with the case and from making a final order under Sec. 137, *held*, that Sec. 142 provides merely for the issue of injunctions pending inquiry to meet an immediate danger or injury, and therefore in a proceeding under Sec. 133, Cr. P. Code, a magistrate is not precluded from making a final order under Sec. 137, though he had made an order under Sec. 142 of the Code for the removal of an existing obstruction or nuisance. (*Lort Williams & Cunliffe JJ.*)

REBATHI MOHAN BOSE *vs.* CHATTAL
CA. SEN.

63 C. L. J. 5 = 1936 Cr. C. 954 (1) = A.
I. R. 1936 Cal. 692.

Secs. 133, 137 & 139 (A)(2)—Encroachment upon a public way—Magistrate directing removal of structure—procedure not followed—effect of.

Criminal Procedure Code (Contd.)

Where a District Board complained about an encroachment upon a certain public way and the Kanungo reported that there had been no encroachment, and thereupon the magistrate held an enquiry under Sec. 133, Cr. P. Code, but did not follow the procedure laid down by Sec. 139(A)(2), and directed the removal of the construction, *held*, that the order was contrary to law and was liable to be set aside. (*Niamazulla J.*)

GANGADHAR MARWARI *vs.* EMPEROR.

1936 A. W. R. 127 = 1936 A. L. J. 116
= 161 I. K. 309 = 37 Cr. L. J. 422 = 1936
Cr. C. 178 = A. I. R. 1936 A. 150.

Sec. 13 & 37.—Order under Section 133 to be set aside when nuisance abates—*not applicable to nuisance which may arise in future—order not to be made absolute without hearing party against whom made.*

An order by a Magistrate under Sec. 137 (4) should not be allowed to remain in force when the nuisance abates. It is applicable only to existing nuisance and not to nuisance that is likely to arise in future. It cannot be made absolute without hearing the party against whom the order is made. (*Varma J.*)

KALYAN MULL MATHUR *vs.* EMPEROR.

37 Cr. L. J. 1159 = 1936 Cr. C. 948 =
A. I. R. 1936 Pat. 577 = 165 I. C. 542

Secs. 133 & 139.—Application for removing a latrine near a well used by the public—*No denial on part of owner of latrine of existence of public right in the well—Sec. 133 if applicable.*

Certain persons applied for removal of of a latrine constructed near a well used by the public on the ground that the latrine would render the water of the well insanitary and unfit for use. The owner of the latrine did not deny the existence of public right in the well and therefore no enquiry was made under Sec. 139, Cr. P. C. *Held*, that the Magistrate could not in the circumstances, make an enquiry under Sec. 139, Cr. P. C. and he was justified in proceeding under Sec. 133 of the Code. (*Macpherson J.*)

MAHABIR PRASAD CHOWDHURY *vs.*
DHANURDHARI PRASAD SINGH.

1936 Cr. C. 641 = 163 I. C. 541
= A. I. R. 1936 Pat. 409

Criminal Procedure Code (Contd.)

Secs. 133 & 139A.—Provisional order to remove unlawful obstruction from a public way—*Denial of existence of public way—Duty of the Magistrate.*

Where a person against whom a provisional order is passed under Sec. 133, Cr. P. Code, to remove an unlawful obstruction from the public way, denies the existence of a public way, the magistrate need not decide whether the denial is valid or not. He is merely to see whether there is some reliable evidence in support of the denial, and if there is such evidence, to stay proceedings until the matter of the existence of the right of way is decided by a competent Civil Court. (*Allsop J.*)

BATUK *vs.* EMPEROR.

1936 A. W. R. 195 (2) = 1936 A. L. J. 76
= 37 Cr. L. J. 365 = 1936 Cr. C. 140 (2)
= A. I. R. 1936 All. 142.

Secs. 133, 139A, 148 & 438.—Order under Sec. 133—*public right denied—proper procedure by Magistrate.*

The opposite party filed an application under Sec. 133, before a Magistrate alleging that the petitioner had caused obstruction to a public way. The petitioner denied the existence of a public path way. The Magistrate, however held a local inspection, took evidence in the matter and called upon the petitioner to remove the alleged obstruction. The petitioner applied to the Additional Session Judge for revoking the magistrate's order.

Held, that the Magistrate ought to have found whether there was any reliable evidence in support of the denial by the petitioner that any public rights existed and thereupon either ought to have stayed the proceedings altogether so that the existence of the public right alleged might be decided by a competent Civil Court or found that there was no such evidence and proceeded as laid down in Sec. 137 or 138. An order under Sec 137 passed without making the enquiry enjoined under Sec. 139A (1) cannot stand. (*Macpherson J.*)

NURSINGH NARAIN *vs.* RAMEEHWAH SINGH.

17 P. L. T. 399 = 37 Cr. L. J. 846 (1) =
1636 Cr. C. 560 = A. I. R. 1936 Pat. 360.
= 163 I. C. 402.

Criminal Procedure Code (Contd.)

Sec. 139A.—Denial of public right—Magistrate's duty under the Section.

The duty of a magistrate under Sec. 139A Cr. P. Code is merely to see whether the denial of a public right is frivolous or not. If the person who denies that right is able to produce some evidence which prima-facie there is no reason to disbelieve, it is not for the magistrate to examine evidence on either side by way of rebuttal and so forth and attempt to arrive at some final decision. (*Allsop J.*)

MAHAMMAD KHALIL *vs.* EMPEROR.

1936 A. W. R. 182=1936 A. L. J. 75
=1936 Cr. C. 420=37 Cr. L. J. 343= A.
I. R. 1936 All. 356.=160 I. C. 854.

Sec. 139A.—Duty of Magistrate acting under Sec. 139A.—He is merely to see that claim is not frivolous and cannot decide question of title.

It is not the duty of a Magistrate when acting in accordance with the provisions of Chapter X of the Cr. P. C. to decide questions of title. Under the provisions of Sec. 139A, it is his duty merely to see that any claim to a piece of land alleged to be a public place or a public way is not frivolous. Where the claim to the land is supported in some measure by the municipal map and also by the fact that the claimant has been in undisturbed possession of the land for a considerable period, it can not be said that the claim to the land is not bonafide. In such a case the Criminal Court cannot go into the title and decide that the land does not belong to the claimant. (*Allsop.*)

JANARDAN SARUP *vs.* EMPEROR.

1933 A. W. R. 1058.

Sec. 139A.—Reliable evidence—meaning of.

The term "reliable evidence" in sec. 139 A. means evidence on which it is possible for a competent Court to place reliance. It does not mean evidence which definitely establishes the title to the land because if that was the meaning of the term it would be unnecessary in any case to refer the matter to the Civil Court at all. It was obviously the intention of the legislature that questions of title should not be decided in a summary proceeding by a Magistrate in

Criminal Procedure Code (Contd.)

a Criminal Court. (*Allsop J.*)

JANARDAN SARUP *vs.* EMPEROR
THROUGH JAGDISH PRASAD.

1936 A. W. R. 1058.

Sec. 139A (2) & 137—Proceedings under Sec. 137 when should begin

The Court and the parties should distinctly understand when the enquiry under Sec. 139A (2) Cr. P. Code terminates and that under Sec. 137 begins, so that evidence not of the preliminary character contemplated by Sec. 139A (2) but such as is contemplated by Sec. 137 be produced. Where the entire proceedings under Chap. X, Cr. P. C. were taken at one stretch and it could not be said that on any particular date the magistrate found that there was no reliable evidence in support of the denial of the public right and that proceedings under Sec. 137, Cr. P. Code should commence thereafter, held, that the order of the magistrate under Sec. 133-137, Cr. P. C. must be set aside and he should be directed to proceed according to law. (*Niamatullah J.*)

GANGADHAR MARWARI *vs.* EMPEROR.

1936 A. L. J. 116=37 Cr. L. J. 422=
1936 A. W. R. 127.=1936 Cr. C. 178=
A. I. R. 1936 All. 150.

Sec. 144—Application of the section.

Sec. 144, Cr. P. Code may be an appropriate remedy when a sudden emergency arises and an immediate order is to be passed for the preservation of the peace, but the repeated use of the section in successive orders, dealing with the same matter, is not justified by the mere fact that on each occasion on which the section was used, it saved the Magistrate a certain amount of trouble in recording evidence and coming to a regular decision of permanent value under Sec. 145 or 147 of the Code. (*Rowland J.*)

INDAR DEO NARAIN & ORS. *vs.*
DURGA PRASAD SING & ORS.

17 P. L. T. 22=160 I. C. 945.—37 Cr.
L. J. 378.=1935 Cr. C. 83=A. I. R. 1936
Pat 59.

Sec. 144 Order for injunction—Proper form—Conditional order to be made absolute subsequently if contemplated by the section.

Clauses (a) & (b) of Sec. 144, Cr. P. Code do not contemplate the passing of a conditional order, to be made absolute later on.

Criminal Procedure Code (Contd.)

The order for injunction must be an absolute and definite order whether passed *ex parte* or on cause being shown, and it must be left to the party to apply for rescinding the order by recourse to the procedure laid down in clauses 4 & 5. (*R. C. Mitter J.*)

EMPEROR vs. BHOLA GIRI MOHUNT.

40 C. W. N. 640 = 63 C. L. J. 137. = 160 I. C. 827 = 37 Cr. L. J. = A. I. R. 1936 Cal. 359 = 1936 Cr. C. 485.

Sec. 144—Order directing person to refrain from certain acts or to show cause against injunction, if proper order under the section—Violation of such order if an offence.

An order in the alternative form directing a person either to refrain from doing certain acts or to show cause against the order of injunction, does not come within the terms of Sec. 144, Cr. P. Code at all. Consequently, there can be no conviction under Sec. 189, Penal Code for violating the supposed injunction contained in such an order. (*R. C. Mitter J.*)

EMPEROR vs. BHOLA GIRI MOHUNT.

40 C. W. N. 640 = A. I. R. 1936 Cal. 259.
163 I. C. 827 = 37 Cr. L. J. = 63 C. L. J. 117 = 1936 Cr. C. 486.

Sec. 144 (3)—Scope of the sub-section.

Sub-section (3) of Sec. 144, Cr. P. C. has nothing to do with the nature of the order passed by the Magistrate, but refers to the manner of promulgation and to the duration of an order passed under Sub-sec. (1) (*Coldstream J.*)

ABDUL KARIM & ORS. vs. CROWN.

17 Lab. 515 = 38 P. L. R. 984.

Sec. 144, 147 & 203—Magistrate refusing to take preventive action and dismissing complaint, if can, on further report by police, take preventive action.

Where a Magistrate did not think it necessary to take action under any of the preventive sections of the Cr. P. Code and dismissed the complaint under Sec. 203 of the Code, held, that it was not open to him on a further report by the police, to take a preventive action under Sec. 147, when the petitioner was not in possession within three months from the institution of the enquiry. (*James & Saunders JJ.*)

Criminal Procedure Code (Contd.)

KINEI MAJHI & ORS. vs. GODINDA PROSHAD SINGH & ORS.

A. I. R. 1936 Pat. 44 = 17 P. L. T. 37. = 160 I. C. 795 = 37 Cr. L. J. 327 = 1936 Cr. C. 69.

Sec. 144 (4)—Application to District Magistrate after order once passed by Sub-divisional Magistrate—Maintenability of such application—Transfer of such case to same Sub-divisional Magistrate for disposal—Propriety of.

The power of the District Magistrate to entertain an application under Sec. 144 (4) to rescind or alter an order made by a Sub-Magistrate is not lost by reason of the fact that the Sub-divisional Magistrate who is subordinate to him had already dealt with an application made under that Sub-section to him. But the power of rescinding the order lies only with the Magistrate to whom the application is made, and the order of the District Magistrate transferring the application to the Sub-divisional Magistrate is bad. Moreover the transfer to the Sub-divisional Magistrate who had already dealt with an application relating to the same matter, under the very same sub-section was not a proper exercise of the power of transfer, even if any such power really existed. (*Pandurang Row J.*)

MOOKA PANDA RAM vs. SINNU MUTHIRIVAN.

71 M. L. J. 761 = 1936 M. W. N. 1089 = 44 M. L. W. 686.

Sec. 145—Application to be added as party, made at the time of argument—if may be entertained.

A Magistrate can rightly refuse to listen to a person who appears at the time of argument and prays to be added a party, even if no notice was issued to her to produce evidence. (*Nanarutty J.*)

JAGDISH PROSHAD SINGH vs. TEJ BHAN SINGH.

1936 O. W. N. 197.

Sec. 145—Order on father, if binding on sons.

The sons are bound by the proceedings

Criminal Procedure Code (Contd.)

taken and the order passed under Sec. 145 Cr. P. C. on a father. (*Grille J.*)

SETH THAKURDAS vs. NARAYAN & ORS.

A. I. R. 1936 Nag. 192

Sec. 145—Enquiry under the Section—Scope of—"Parties concerned in such dispute"—Meaning of.

An enquiry under Sec. 145 Cr. P. Code is confined to the fact of actual possession irrespective of the merits of the claims of the parties concerned. A claim therefore merely to a right to possess as distinguished from a claim to be in possession would be outside the scope of the enquiry. It is therefore not necessary that all persons interested in or claiming a right to the property in dispute or entitled to it should be made parties to the proceeding, 30 Cal. 155 relied on. (*Ganganath J.*)

BHUNESWAR PRASAD vs. EMPEROR.

1936 Cr. C. 673=1936 A. L. J. 796=
1936 A. W. R. 636=A. I. R. 1936 All.
531.=164 I. C. 180=37 Cr. L. J. 886.

Sec. 145—Application to be impleaded as party, if may be entertained at the time of arguments.

In a case under Sec. 145 Cr. P. Code, where no notice is issued to a person to produce evidence nor does such person actually produce any evidence, but he appears when the arguments are being heard and applies for being impleaded as a party, the magistrate is justified in refusing to entertain the application. (*Nanavutty J.*)

JAGADISH PRASAD SINGH vs. TEJ-
BHAN SINGH.

1935 O. W. N. 147.

Sec. 145—Drawing up a preliminary order, if essential.

The question of possession has to be decided with reference to the date of the preliminary order, and if there is no preliminary order, the one question which the magistrate has to decide cannot be decided. Unless there is a preliminary order under Sec. 145 (1), Cr. P. Code, the Magistrate has no jurisdiction to pass any order under Sec. 145 (6) of the Code. (*Burn J.*)

MARIASUSAI UDYAN & ORS. vs.
HAJEE MAHAMMED AZEZUDDEN SAIB.

Criminal Procedure Code (Contd.)

71 M. L. J. 305.=164 I. C. 689 (2)=37
Cr. L. J. 953.=1936 M. W. N. 647=44
M. L. W. 305=1936 Cr. C. 948 (1)=A.
I. R. 1936. Mad. 824

Sec. 145—Court, if precluded from taking action under the section on finding that the land is Shamilat.

The mere fact that the land in dispute is Shamilat does not preclude the Court from making an enquiry and taking proceedings under Sec. 145, Cr. P. Code. (*Currie, J.*)

JIANI & ORS. vs. THE CROWN.

38 P. L. R. 332.=1936 Cr. C. 118=A.
I. R. 1936 Lah. 1015.

Sec. 145—Order under the section passed in favour of a party—Subsequent proceedings under the section if maintainable regarding the same property and between the same parties.

A party declared to be entitled to possession under Sec. 145 (6) Cr. P. Code is entitled to be protected against disturbance of such possession until evicted therefrom in due course of law, otherwise it could be possible for the opposite party to harass his opponents by instituting successive proceedings under Sec. 145. The party aggrieved by the order under Sec. 145, have their remedy in a Civil Court, when the question of title and possession can be settled as between the contending parties. (*Lort Williams & Cuthliffe JJ.*)

ELIMUDDIN SARKAR & ORS. vs. UMED
ALI BEPARI & ORS.

63 C. L. J. 7.=165 I. C. 808.=1936 Cr.
C. 881.=A. I. R. 1936 Cal. 659.

Sec. 145 (4)—Dispute about a house—Attachment of house with movables in it, if legal.

Where there is a serious danger of a breach of the peace arising from a dispute about a house, it is not for the magistrate to pass an order attaching the house containing movables inside it, under Sec. 145 (4), proviso, Cr. P. Code. The proper course for a person claiming the movables is to obtain permission from the magistrate to enter upon the premises for the purpose of removing anything which he may satisfy the magistrate is his personal property. (*Allsop J.*)

NIRANJAN LAL vs. EMPEROR.

Criminal Procedure Code (Contd.)

1936 A. W. R. 192. (1) = 160 I. C. 870 (1) = 37 Cr. L. J. 346 = 1936 A. L. J. 83 = 1936 Cr. C. 140 (1) = A. I. R. 1936. All. 141.

Sec. 145 (9)—*Witnesses mentioned by either party—Magistrate, if bound to summon all of them.*

Sub-sec. (9) of Sec. 145, Cr. P. Code, leaves it entirely to the discretion of the Magistrate whether he will or will not summon witness or witnesses mentioned to the Court by either party in proceedings under that section. 28 A. L. J. 484 doubted. (*Allsop J.*)

KUNJ BEHARI DAS & ORS. vs. EMPEROR.

1936 A. L. J. 370 = 1936 A. W. R. 439.
162 I. C. 736 = 37, Cr. L. J. 694. = 1936 Cr. C. 492. = A. I. R. 1936 All 322.

Secs. 145 & 146—*Magistrate attaching property under Sec. 145, when mutation proceedings pending—possession, if may be delivered to successful party in Revenue Court.*

Where a magistrate attaches the property in dispute under Sec. 145 (4), Cr. P. Code, when mutation proceedings are pending regarding the property, he cannot direct that possession be delivered to the party who was successful in the Revenue Court. The proper course is for the successful party to seek possession from the Revenue Court. (*Ganganath J.*)

RADHARAMAN DAS vs. EMPEROR.

1936 A. W. R. 125. = 160 I. C. 20 = 37 Cr. L. J. 245 = 1936 A. L. J. 197 = 1936 Cr. C. 211 = A. I. R. 1936. All 177

Secs. 145 & 147 Proceedings covered by Sec. 147—*Fact that Sec. 145 has been quoted, if can alter real character of proceedings.*

Where the initial notice, the written statements, and the subsequent proceedings including the operative order are all substantially covered by Sec. 147, Cr. P. Code, the fact that a wrong section, namely, section 145 has been quoted by the magistrate will not alter the real character of the proceedings. (*Niamaiullah J.*)

GAJRAJ SINGH vs. EMPEROR.

1936 A. L. J. 746 = 1936 A. W. R. 529.
162, I. C. 760 = 37 Cr. L. J. 705. = 1936 Cr. C. 490 = A. I. R. 1936. All 320,

Criminal Procedure Code (Contd.)

Sec. 146—*Object and scope of the section—duty of the Magistrate.*

Sec. 146, Cr. P. Code presupposes an enquiry by the magistrate on the evidence recorded, and the object of the section is to give the magistrate jurisdiction to attach the property, if upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order under Sec. 145 was drawn up. Where there is no evidence of any kind on record, the order attaching property is without jurisdiction. A magistrate cannot say that he is unable to satisfy himself, if he has made no effort to do so. (*Ganganath J.*)

EMPEROR vs. RADHA RAMAN & ANR.

164 I. C. 20.

Sec. 147—*Circumstances justifying action under the section—dispute likely to cause breach of peace in future, if sufficient.*

In order that action under Sec. 147 Cr. P. Code, may be taken, there must be a present dispute and a fear of disturbance. If there be no present danger of breach of the peace, the fact that there is a dispute which is likely to cause a breach of the peace, in the future, will not justify action under the section. (*Guha & Lodge JJ.*)

JAGABANDHU MISRA vs. MANAGER, INDIA JUTE MILLS, SERANPORE.

40 C. W. N. 351. = 161 I. C. 336. = 37 Cr. L. J. 251.

Sec. 147—*District Magistrate passing order enabling one section of religious community to enter upon samadh in possession of other section, but not proceeding under Sec. 147,—Order, if binding on other section.*

It is not proper to use official means to enable any party to trespass upon land in the possession of another unless it is decided in the exercise of some jurisdiction that the party who wishes to enter upon the land is entitled to do so. So a District Magistrate, unless he proceeds under the provisions of Sec. 147, Cr. P. Code, is not authorised by any rule of law to pass an order that one section of a religious community is entitled to enter upon the premises of a samadh in possession and management of the other section to perform

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religious ceremonies. Such an order cannot be binding upon any body. (*Allsop J.*)

GUR MAUJ SARAN *vs.* RADHASWAMI SATSANG SABHA, DAYAL BAGH AGRA.

1936 A. W. R. 881, = 1936 A. L. J. 1047
= A. I. R. 1936 All. 769 = 165 I. C. 731
= 1936 Cr. C. 100.

Sec. 162—*Accused under police custody taken to headman and his statement recorded by him—Validity of the procedure.*

An accused arrested by the police was taken by them to the headman who recorded the accused's statement. *Held*, that the statement could not be allowed to stand on the record nor the headman to give oral evidence of it, because it was taken down while the accused was fraudulently under police custody, and while the headman was merely acting as their agent. (*Mosely & Ba U JJ.*)

NGA BA KYAING *vs.* EMPEROR.

A. I. R. 1936 Rang. 131—1936 Cr. C. 219
—162 I. C. 6 = 37 Cr. L. J. 534.

Sec. 162—*Question by prosecution to witness declared hostile whether he made certain statements to police, if constitutes violation of the provisions of the Section.*

If the prosecution in cross-examining certain of its own witnesses whom it has declared hostile, merely asks them whether they made certain statements to the police which they deny, there is no actual infringement of Sec. 162. Cr. P. Code, and the trial is not vitiated. (*Cunliffe & Hamblerson JJ.*)

DELBAR MANDAL *vs.* EMPEROR.

40 C. W. N. 783, 165 I. C. 31, = 37 Cr. L. J. 1117.

Sec. 162—*Statements made by witnesses to police—how to be recorded—right of accused to be furnished with copies.*

Statements made by witnesses to police and recorded under Sec. 161, should not form part of the case diary under Sec. 172, but should be recorded on separate pieces of paper and attached to the diary. The practice of writing up these statements at the end of the day from memory or with the aid of rough notes is objectionable, although of course there is no harm, in that being done as well, provided that the

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original statements are preserved and produced at the time of trial. But whatever the method of recording may be, the right of the accused to be furnished with a copy is unquestionable, and it will not do to say that the statements are not traceable. If an accused is denied the copies of statements, it amounts to an illegality, which cannot be cured, because the extent of the prejudice caused cannot be gauged. 26 N. L. R. 281; 6 Rang. 672, 8 Pat. 279 and 53 All. 458 relied on. (*Bose J.*)

VISWANATH PANDURANG KUNBI *vs.*

A. I. R. 1936 Nag. 249 = 1936 Cr. C. 1040

Sec. 162 & 172—*Record of statement heard by a police officer and recorded in diary—evidence from it, when can be produced.*

Sec. 172, Cr. P. Code does not forbid a recorded statement to be used at a trial for an offence not under investigation when it was made. There is however no doubt that the record of a statement heard by a police officer in exercise of the power conferred by Sec. 161 of the Code and recorded either in the Diary or separately in the course of investigation proceedings is an unpublished official record relating to an affair of state, evidence derived from which cannot be produced in a case to which the first proviso to Sec. 162 is not applicable except with the permission of the officer at the head of the Police Department. By itself the record of the statement will prove nothing. It cannot in any sense be termed a deposition and it is not evidence. It is not a public document, a copy of which must be given on demand under the provisions of the Evidence Act. (*Coldstream J.*)

BAIG NATH BHATNAGAR *vs.* MUHAMMED DIN.

17 Lah. 572 = 38 P. L. R. 1040 = 1936 Cr. C. 300 = A. I. R. 1936 Lah. 359.

Sec. 164—*Magistrate, if bound to record every confession made to him.*

Whether a magistrate will at all record a confession made to him is discretionary with him and not obligatory, but if he does record, he must proceed under the provisions of Sec. 164 Cr. P. Code. (*Lord Roche*)

NAZIR AHMED *vs.* EMPEROR.

40 C. W. N. 1221—1936 C. W. R. 620

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= 1936 O. W. N. 505 = L. I. R. 136 P. C. 255, = 17 Lah 629 = 63 I. C. 372 = 1936 M. W. N. 745 = 1936 A. L. J. 895 = 17 P. L. T. 594, = 163 I. C. 881, = 19 N. L. J. 214, = 37 Cr. L. J. 897 = 44 M. L. W. 583, = 1936 Cr. C. 752 (2) = 38, Bom. L. R. 987 = A. I. R. 1936 P. C. 353 (2) = 11, M. L. J. 476 (P.C.).

Sec. 164—*Confession—Magistrate putting questions of stereotyped character—Internal indication that confession not voluntarily made—confession is of no value against co-accused and of not much importance against confessing accused.*

Where in the case of a confession the questions put by the Magistrate to satisfy himself as to whether the confession was voluntarily made are all of a stereotyped character and there are internal suggestions that the confession was not the outcome of the confessing accused's own desire to state what he knew, and the confession is subsequently retracted, it is of little value against the co-accused and even against the confessing accused not much importance is to be attached to it. (*Niamatulla & Ganganath JJ.*)

MAUJI & ORS. vs. EMPEROR.

1936 A. W. R. 348 = 1936 A. L. J. 669 = 1936 Cr. C. 501 = 162 I. C. 914 = A. I. R. 1936 All. 368.

Sec. 164—*Admissibility of confessional statements—objections if may be made for the first time in High Court.*

The High Court cannot give effect to the contention sought to be raised before it for the first time, relating to the inadmissibility of confessional statements, in evidence for the reason that they were not recorded in the manner contemplated by Sec. 164 Cr. P. C. (*Guha & Bartley JJ.*)

NARAYAN CH. BISWAS vs. EMPEROR.

63 C. L. J. 191 = 1936 Cr. C. 200 = 37 Cr. L. J. 445 = 161 I. C. 289 = A. I. R. 1936 Cal. 101.

Sec. 164—*Practice of sending confessing accused to police custody—propriety.*

An approver making a confession which took some six or seven days to be completed, was returned to police custody, after every instalment was made. After the confession was complete he was returned to police custody, and stayed there for a considerable time.

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Held, the procedure was highly improper, and would damage the whole case in which such a confession was used. (*Young C. J. & Monroe J.*)

ABDUL SATTAH vs. EMPEROR.

17 Lah 460 = 38 P. L. R. 1 = 37 Cr. L. J. 493 = 1936 Cr. C. 248 = 161 I. C. 793 = A. I. R. 1936 Lah. 278.

Sec. 164—*Confession—when and where to be recorded—custody of accused after confession.*

A confession should unless there are exceptional reasons to the contrary, be recorded in open Court and during Court hours. If there are exceptional reasons they should be disclosed in evidence. After a confession is recorded the confessing accused should not be returned to the custody of the police. (*Young C. J. & Abdul Rashid J.*)

JAHANA vs. THE CROWN.

38 P. L. R. 791.

Sec. 164—*Confessing persons—likelihood of making false statements, when there is likelihood of being returned to police custody.*

If confessing persons know that there is a likelihood of their being returned to police custody after making confessions, they would be more inclined to make false confessions at the instance of the police than they otherwise would do. (*Young C. J. Monroe J.*)

NARAYAN SINGH vs. EMPEROR.

17 Lah. 419 = 38 P. L. R. 320 = 37 Cr. L. J. 567 = 1936 Cr. C. 298 = 162 I. C. 379 = A. I. R. 1936 Lah. 257.

Sec. 164—*Confession, if inadmissible in evidence when recorded without the actual warning given and without the signature of the accused.*

A retracted confession cannot be admissible in evidence on the ground that the Magistrate recording it did not write down the actual warning he gave in vernacular although be recorded their substance,—because such warnings are no part of the confessional statement, and particularly in a case where the Magistrate gives evidence as to the warnings he gave which are found sufficient; nor on the ground that the confession is not signed by the accused when the

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recording Magistrate gives evidence to prove the confession; nor on the ground that the Magistrate did not ask the accused in so many words whether it was a voluntary confession, when there is no question that the Magistrate satisfied himself as to its voluntary character. 2 Lah. 325 distinguished. (*Cunliffe & Henderson JJ.*)

EMPEROR vs. ARAJADDIN MOLLA.

40 C. W. N. 872. 165 I. C. 196 = 37 Cr. L. J. 1101.

Sec. 164—*Accused on being given hopes of lenient treatment making confession—usual warning by magistrate—confession, if admissible.*

When the accused was given hopes of lenient treatment if he made a confession, and he made a confession, but before such confession was made, he was warned by the magistrate that any confession that he made was liable to be used against him held, that the confession could not be said to have been made as a result of inducement, and was admissible in evidence. (*Teach & Spargo JJ.*)

HAMID vs. EMPEROR.

37 Cr. L. J. 1112 = 1936 Cr. C. 849 = 164 I. C. 1118 = A. I. R. 1936 Rang. 453.

Secs. 164 & 364—*Confession—Magistrate proving oral confessions—no memo of precautions taken—evidentiary value of such confessions*

When a Magistrate proves confessions made to him orally, and states that he told the accused he was a Magistrate, but it was not recorded in the memo prepared by him, the confession is of little evidentiary value. (*Dalip Singh J.*)

LAL SINGH vs. EMPEROR.

38 P. L. R. 881 = 164 I. C. 373 = A. I. R. 1936 Lah. 707 = 37 Cr. L. J. 736 = 1936 Cr. C. 736.

Sec. 164 & 533—*Confessions—Magistrate has discretion to record it in writing—Formalities to be observed when reduced to writing—admissibility under Sec. 533, when formalities not observed.*

Section 164 does not in terms require a magistrate to whom a confession is made to record it at all. If however he does record it, then the section makes it compulsory that he shall record it in

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a certain way. But when a confession has been reduced to writing, but section, 164 has not been fully complied with, then of course Sec. 533, becomes in terms a special provision referred to in Sec. 1 (2) and prevents the confession being ruled out as entirely incapable of proof. (*Baguley J.*)

NGA THEIN MAUNG vs. EMPEROR.

164 I. C. 162 = A. I. R. 1936 Rang. 350

Secs. 164 & 364—*Confession to magistrate not recorded under Sec. 164 or 364 if admissible and if can be proved by Magistrate orally.*

The effect of Secs. 164 & 364, Cr. P. Code which must be construed together, is that a confession can be recorded by a Magistrate only in the manner prescribed in those sections and can be proved only by such record. A confessional statement not recorded in accordance with the procedure laid down in those sections is inadmissible in evidence and cannot be proved orally by the Magistrate. (*Lord Roche*)

NAZIR AHMED vs. EMPEROR.

40 C. W. N. 1221 = 1936 A. W. R. 620 = 1936 O. W. N. 505 = A. I. R. 1936 P. C. 255. (2) = 17 Lah. 629 = 63 I. A. 372 = 1936 M. W. N. 745 = 1936 A. L. J. 895 = 17 P. L. T. 594 = 163 I. C. 881 = 19 N. L. J. 214 = 37 Cr. L. J. 897 = 44 M. L. W. 583 = 1936 Cr. C. 752 (2) = 38 Bom. L. R. 987 = 71 M. L. J. 475 (P. C.)

Secs. 164 & 364—*Magistrate acting under the sections, if a judicial officer—particular thing, excluding other methods of doing the thing, if applies to Sec. 164.*

The Magistrate acting under Secs. 164 & 364 of the Cr. P. Code is a judicial officer, though not a court; and the rule, applying to Courts, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, applies to Sec. 164. (*Lord Roche*.)

NAZIR AHMAD vs. EMPEROR.

40 C. W. N. 1221 = 17 P. L. T. 594 = 1936 A. W. R. 620 = 71 M. L. J. 476 (P. C.) 17 Lah. 629 = 63 I. A. 372 = 1936 O. W. N. 505 = 1936 M. W. N. 745 = 1936 A. L. J. 895 = 163 I. C. 881 = 19 N. L.

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J. 214=37 Cr. L. J. 897=44 L. W. 583
=1936 Cr. C. 752(2)=38 Bom. L.R. 987
=A. I. R. 1936 P. C. 253 (2)

Secs. 164, 364 & 533—Sec. 533 if applies where Secs. 164 & 364 not followed nor purported to have been followed.

Sec. 533, Cr. P. Code has no application where the Magistrate neither acted nor purported to act under Sec. 164 or 364 and where nothing is tendered in evidence as recorded or purporting to have been recorded under either of those sections. (*Lord Roche*.)

NAZIR AHMED vs. EMPEROR.

40 C. W. N. 1221=1936 A.W.R. 820=
1936 O. W. N. 505=A. I. R. 1936 P. C.
255 (2)=17 Lah. 629=63 I. A. 372=
1936 M. W. N. 745
1936 A. L. J. 895=17 P. L. T. 593=163
I. C. 881=19 N. L. J. 214
=37 Cr. L. J. 897=44 L. W. 583=1935
Cr. C. 752 (2)=38 Bom. L. R. 987=71
M. L. J. 496 (P.C.)

Secs. 164, 364 & 533—Failure to question accused as to whether confession made by him was voluntary, is a fatal defect.

The failure of the magistrate recording a confession to question the accused in order to ascertain whether it was being made voluntarily, is a defect not curable under Sec. 533, Cr. P. Code. The record of confession cannot therefore be admitted in evidence. (*Young C. J. & Rangilal J.*)

BAKHSAN vs. CROWN.

37 P. L. R. 869.

Sec. 172—Recorded statement if may be used for trial of offence not under investigation when it was made.

Sec. 172 of the Code does not forbid a recorded statement to be used at a trial for an offence not under investigation when it was made. (*Coldstream J.*)

BALINATH BHATNAGAR vs. MAHAMMAD DIN.

17 Lah. 47Y=A. I. R. 1936 Lah. 359
=38 P. L. R. 1040=1936 Cr. C. 300

Secs. 172—Police diary if may be used by trial Court.

Any criminal court may use the police diary to aid it in the trial. (*Mosely & Ba u J.J.*)

NGA SAN BA vs. EMPEROR.

37 Cr. L. J. 414=161 I. C. 14=1936
Cr. C. 80=A. I. R. 1936 Rang. 75.

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Sec. 175, 235—Conspiracy to cheat—conspiracy entered into at one place—acts of cheating done in another place—trial if may be held at place where acts of cheating done.

A conspiracy to cheat was entered into in Bombay, where the accused lived, and one or two acts of cheating were done in another place.

Held the court within whose jurisdiction the different acts of cheating were done could not be clothed with jurisdiction to try the charge of conspiracy merely because the conspiracy and the different acts of cheating might form part of the same transaction. (*Menon J.*)

IN RE DAN & ORS.

1935 M. W. N. 1163=162 I. C. 504=
1936 Cr. C. 304=A. I. R. 1936 Mad. 317

Sec. 177—Offence committed at two places only one place stated in charge—trial if vitiated.

When an offence is committed in two places it is desirable to mention both places in the charge. Omission to mention one of the places in the charge does not affect the conviction, as the accused is not thereby misled in his defence. (*Varma & Rowland J.J.*)

NANKOU MAITON vs. EMPEROR.

17 P. L. T. 472=37 Cr. L. J. 862=
1836 Cr. C. 558=A. I. R. 1936 Pat. 358
=163 I. C. 805.

Secs. 177 & 531—Conviction when liable to be set aside on the grounds of trial having taken place in a wrong district.

Sec. 177, Cr. P. Code, provides only for the ordinary "place of enquiry and trial" and there is no difficulty whatsoever in reading it along with Sec. 531 of the Code, the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in the wrong district, but that the party aggrieved is entitled to have the conviction set aside if he shows that such error has in fact occasioned a failure of justice and that the accused have been prejudiced by the trial having taken place in a wrong district. 34 C. L. J. 200, 42 Mad. 791 relied on; 3 Pat. 417 distinguished. (*Dharle & Agarwalla J.J.*)

ACHARIA SINGH & ANR. vs. EMPEROR.

15 Pat. 415=A. I. R. 1936 Pat. 410.

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Sec. 179—*Offence under the section when complete.*

The offence contemplated in Sec. 179, Cr. P. C. are those which are not complete till a specified consequence has ensued. The consequence must be an essential ingredient of the offence and it must arise within the jurisdiction of the Court trying the offence. Therefore where a paper was published according to the declaration made by the publisher at Delhi, but had also been circulated at other places within the District of Hosangabad, the consequence must be held to have arisen at Delhi, and the consequence which arose in Hosangabad being one which had already arisen at Delhi, Sec. 179, Cr. P. Code did not apply, and the Court at Hosangabad had no jurisdiction to try the offence. 20 N. L. R. 72 relied on. (*Neogi & Gruer, A. J. Cs.*)

DIWAN SINGH MAFTOON vs. EMPEROR.

A. I. R. 1936 Nag. 55=161 I. C. 635,
37 Cr. L. J. 474 (2)=1936 Cr. C. 367.

Sec. 181 (2)—*Servant entrusted with the duty of realising money at different places and depositing same in one place—breach of duty—venue of trial.*

It is the duty of the accused to keep accounts of all the monies realised by him at different places and to deposit the monies so realised at a certain place and get accounts entered there and if the accused fails to deposit the money and to render accounts at the said place, the Court at that place is fully competent to try the accused. 26 C. W. N. 175, 41 C. L. J. 80 & 59 Cal. 93 relied on. (*Zia-Ul-Hasan J.*)

BRIJ KISHORE vs. CHANDRIKA PROSAD.

1936 O. W. N 212=163, I. C 567= 37
Cr. L. J. 322, =1936 Cr. C. 847=A. I. R.
1936 Oudh. 329.

Sec. 182—*False information given to public servant by letter posted at one place and delivered at another—Court, by which, offence triable.*

Where a false information given to a public servant constituting an offence under Sec. 182, Penal Code is contained in a letter posted at one place and delivered

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at another, the offence is committed partly in one local area and partly in another so that it may be enquired into or tried by a Court having jurisdiction over either of the local areas. A. I. R. 1932 Mad. 427 distinguished. (*Niamatullah & Allsop JJ.*)

EMPEROR vs. NARAIN DAS.

1935 A. W. R. 1476.

Sec. 188—*Mandatory order, if can be passed by a magistrate proceeding under the Section.*

Under Sec. 188, Cr. P. Code, a magistrate can pass an order restraining a person from doing a certain act, but he cannot pass an order directing a person to do a particular act. A person directed by a magistrate under the section to do a particular act, cannot be proceeded against for disobedience of such order. (*Lort-Williams & M. C. Ghose JJ.*)

KUSHUM KUMARI DEVI vs. HEM NALINI DEBI.

63 Cal. 11.

Sec. 188—*Provisions of the Section when applicable.*

Sec. 188, Cr. P. Code, deals with procedure and nothing else. To attract the section, it must be shown that an accused has been guilty of an act or omission made permissible by some law (which must mean some law applicable to British India) for the time being in force. Where the Court is dealing with an act committed outside British India by an Indian subject which would be an offence punishable under the Penal Code, if it had been committed in British India, Sec. 4 of the Penal Code, as it now exists, constitutes the act an offence, and it can be dealt with under Sec. 188, Cr. P. Code. (*Beaumont C. J. & N. J. Wadia J.*)

NARAYAN MUDELAGIRI MAHALE vs. EMPEROR

59 Bom. 755

Sec. 188—*Offence committed by European British subject outside India—claim to be tried as European British subject when may be raised.*

When a European British subject commits an offence in the territories of any native Prince or chief in India, his claim to

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be tried as European British subject arises after the certificate has been furnished, and it has been decided to treat him as if the offence had been committed in British India (*Grille J.*)

W. F. ZINCKE vs. EMPEROR.

A. I. R. 1936 Nag. 152.

Sec. 190—Magistrate trying accused under one section—knowledge gained from evidence that offence under another section committed.—*Duty of Magistrate.*

If a Magistrate takes cognisance of an offence, other than the offence for which he is proceeding, under Sec. 190 (c), Cr. P. Code, knowledge of which he gained not upon a report made by a police officer, but from evidence to which he had listened, it is his bounden duty to afford the accused person an opportunity of saying whether he wishes to be tried or not by that Magistrate. (*King J.*)

RAJRATANAM PILLAI IN RE.

70 M.L.J. 340 = 59 Mad. 442 = 161 I.C. 846 = 37 Cr. L. J. 501 = 43 M.L.W. 367 = 1936 M. N. 181 = 1936 Cr. C. 384 = A. I. R. 1936, Mad. 341.

Sec. 193 (1) (c)—Taking cognisance—meaning of—cognisance when taken

The expression "taking cognisance of an offence" in Sec. 190 of the Code deals with a matter of a purely technical nature. Cognisance is usually taken upon complaint when process is issued, before evidence is recorded. It is the complaint therefore which gives jurisdiction to the Magistrate to try the offence. When, however a Magistrate thinks upon hearing the evidence that a charge different from one indicated by the complaint should be framed, he does not take cognisance under Sec. 190 (1) (c) 53 Cal. and 12 Pat. 758, referred. (*Wassondew J.*)

BARURAO vs. EMPEROR.

165 I. C. 867 = A. I. R. 1936 Bom. 379

Sec. 193 & 195—Complaint—Courts must consider case as a whole—when special complaint necessary Courts cannot proceed without special complaint.

When a complaint is made there must be no splitting up of facts, and the Court is not entitled to disregard some of the facts and try or convict an accused person

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for an offence which the remaining facts disclose. If these facts disclose an offence for which a special complaint is necessary a Court cannot take cognisance until the special complaint has been filed. (*King J.*)

MUTHUVELU KUDUMBARAN vs. SAMIYA KUDUMBARAN

59 Mad. 1083 = 37 Cr. L. J. 1134 = 1936 M. W. N. 641 = 71 M. L. J. 485 = 165 I. C. 292.

Sec. 195—Cognisance of offence against some accused—Court if entitled to proceed against all persons concerned in the crime.

When cognisance has once been taken of an offence by a Magistrate, the enquiry must proceed against all the persons whom the evidence shows to have been concerned in the offence, and also under any sections found applicable to the facts. (*Rowland & Dhavle JJ.*)

JOGESHWAR SINGH vs. KING EMPEROR.

17 P.L.T. 134 = 15 Pat 26 = 164 I. C. 86 = 37 Cr. L. J. 893 = 1936 Cr. C. 539 = A. I. R. 1936, Pat. 346.

Secs. 195 & 482 "Court" Meaning of.

The word "Court" in Sec. 482 Cr. P. C. and also in Sec. 195 Cr. P. C. means all the members constituting the particular Court in question, and a Sirpanch not a member of a Court actually sitting, cannot in law represent the Court for the purpose of making a complaint under Sec. 195 Cr. P. C. or hold an enquiry under Sec. 482 Cr. P. C. (*Gruer J.*)

VITHAL SONALI MARATHE vs. EMPEROR.

A. I. R. 1936 Nag. 275 = 1936 Cr. C. 1120.

Sec. 195 (1) (b)—Power of court to make complaint, if confined to parties only.

There is nothing in Sec. 195 (1) (b) Cr. P. Code, which confines the powers of the Court to persons who are parties to the proceedings. Therefore a Court has power to file a complaint against a witness, who is not a party to the suit or proceeding. Sub-sec. (c) of Sec. 195 (1) confines the power of the Court to parties to the proceedings, but then it is in respect of

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documents and not of oral evidence. (Parker J.)

EMPEROR vs. U KADOE,

A, I. R. 1936 Rang. 369 = 1611 C. 769,
= 37 Cr. L. J. 1008, = 1936 Cr. C. 771,

Sec. 195 (i) (b)—*False statement made in investigation by public with intention that there should be trial in consequence of it—Provision of the Section if applicable.*

The words in Sec. 195 (i) (b), Cr. P. Code "in relation to any proceedings in any Court" apply to the case of a false report or a false statement made in an investigation by the police with the intention that there should be in consequence of this a trial in the Criminal Court. 117 I. C. 147 followed (Blacquer J.)

GHULAM RASUL vs. EMPEROR.

37 P. L. R. 738 = A, I. R. 1936 Lah. 283
= 1611 C. 288 = 1936 Cr. C. 209 = 37
Cr. L. J. 426.

Sec. 195 (1) (b)—*Prosecution for making a false statement under Sec. 160 --complaint by Magistrate, if necessary.*

A Magistrate recording a statement under Sec. 164. Cr. P. Code is a "Court" within the meaning of Sec. 195 of the Code. Therefore when a false statement is made by a person before a Magistrate recording a statement under Sec. 164, no court can take cognisance of the offence without a written complaint by the Magistrate. (Sulaiman C. J. & Bajpai J.)

EMPEROR vs. HAR NARAIN & ORS.

57 All. 778

Sec. 195 (1) (b)—*Parties if may avoid requirements of the section by proceeding under a different section of the Penal Code.*

Parties should not be allowed to avoid the provisions of Sec. 195 (1) (b), Cr. P. Code by filing a complaint under another provision of the Penal Code, if clearly an offence under Sec. 193, Penal Code or any other section mentioned in Sec. 195 (b), Cr. P. Code, has been committed. (Madhavan Nair & Burn JJ.)

APPADURAI NAINAR & ORS. vs. EMPEROR.

59 Mad. 165

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Secs. 195 (1) (c) & (2).—*"Relevant date"—which date is meant.*

Under Sec. 195 (1) (c) the relevant date which has to be considered by the Court is the date the Court is invited to take cognisance of the complaint. (Beaumont C. J. & Wadia J.)

EMPEROR vs. RACHAPPA YELLAPPA.

60 Bom. 756 = 38 Bom. L. R. 440 = A. I. R. 1936 Bom. 221 = 1936 Cr. C. 279 = 37 Cr. L. J. 814.

Sec. 195 & 476—*Complaint under the section against certain persons—Magistrate, if debarred from proceeding against others against whom complaint not made or refused to be made.*

The Cr. P. Code provides for taking cognisance of offences and not of offenders. Consequently, a complaint made under Sec. 476 of the Code need not be against any specified individual or individuals; and even when the complaint names certain persons as the accused, the Magistrate enquiring into the same is not debarred from taking action against other persons whom the evidence may disclose to be concerned in the matter, even though the Court making the complaint may have refused to make a complaint against them on being moved to do so. 21 C. W. N. 950 followed: 23 Cal. 532 dissented from. (Lort Williams & Jack JJ.)

NETAI CHARAN GHOSE & ORS. vs. KHETTRA NATH GANGULY.

40 C. W. N. 573.

Secs 195 & 476B—*Appeal from order of Munsiff under Sec. 476—District Judge for disposal.*

Under Sec. 195 (3), Cr. P. Code, the only Court competent to hear an appeal from an order passed by a Munsiff under Sec. 476, Cr. P. Code, is the District Judge. Therefore the latter is not entitled to transfer such an appeal from his file to that of a Subordinate Judge for disposal. The Subordinate Judge not being competent to try or dispose of the appeal, the provisions of Sec. 24 (1) (a) cannot be invoked to authorise such a transfer. (Bennet J.)

MANPHOOL vs. BUDDHU.

57 All. 785

Sec. 195 & 537—*Communication by Sub-Inspector to Supdt. of Police for*

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obtaining sanction for the prosecution of a person under Sec. 177, Penal Code and forwarded by latter to Magistrate is not a complaint within Sec. 195.—defect if curable under Sec. 537.

A communication made by the Sub-Inspector of Police to the Superintendent of Police with a view to obtaining sanction for the prosecution of a person under Sec. 177, Penal Code, and forwarded by the latter to the Magistrate does not amount to a complaint within the meaning of Sec. 195, Cr. P. Code; and as in such a case there is no complaint before the Court, the Court has no jurisdiction to take cognisance of the offence contained in the communication. The trial in such a case is illegal and the illegality cannot be cured under Sec. 537, Cr. P. Code. (*Sulaiman C. J. & Rachpal Singh J. dissenting*)

LAKHAN vs. EMPEROR.

1936 A. W. R. 935—165 I. C. 769=
1936 Cr. C. 1011=1936 A. L. J. 1064,
A. I. R. 1936 All. 788.

Sec. 197—*Authority granted to subordinate authority to remove public servant—sanction to prosecute, if must be obtained from superior authority.*

Where an authority delegates the power to remove a public servant to a subordinate authority, the public servant for the purposes of Sec. 197, Cr. P. Code, nevertheless continues to be removable by the original authority. Sanction to prosecute such public servant must be obtained from the local government or other superior authority, and the delegation of power to a subordinate authority cannot dispense with the necessity of obtaining the sanction of the superior authority. (*Currie J.*)

H. A. M. NEWBOULD vs. EMPEROR.

A. I. R. 1936 Lah. 781.

Sec. 197.—*Prosecution of chairman of District School Board constituted under Bombay Primary Education Act—Sanction of government if necessary.*

The chairman of a District School Board constituted under the Bombay Primary Education Act, is a public servant not removable from his office save by or with the sanction of the Local Government. Consequently he cannot be prosecuted without sanction

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of the government being first obtained. (*Broomfield & Wassoodew. J. J.*)

IN RE NANASAHEB AHMEDSAHEB.

38 Bom. L. R. 956=1936 Cr. C. 1104
=165 I. C. 901=A. I. R. 1936 Bom. 453.

Secs. 200 & 437 (a)—*Complaint under Municipal Commissioner's direction—is not complaint by a public servant—non-examination of complainant—is an irregularity & not illegality.*

When articles are seized under the provisions of the B. & O. Food Adulteration Act and their condition warrants a complaint of an offence under Sec. 3 of the said Act committed within the Municipal area, the Commissioners can make a complaint in proper form to a magistrate. A conviction by the magistrate on such complaint of an offence punishable under Sec. 3 (2) of the B. & O. Food Adulteration Act without examining the complainant under Sec. 200 Cr. P. Code is an irregularity and not an illegality and can be disregarded under the provisions of Sec. 537 (a), Cr. P. Code. (*James J.*)

RAMJAS MARWARI vs. PURULIA MUNICIPALITY

17 P. L. T. 258,=160 I. C. 343.= 37
Cr. L. J. 289=1936 Cr. C. 331=A. I. R.
1936 Pat. 145.

Secs. 202 & 203—*Order dismissing complaint under Sec. 203—fresh complaint on same facts, if may be entertained.*

Though a previous order dismissing a complaint under Sec. 203, Cr. P. Code is not a bar to the institution of a fresh complaint, it is only in exceptional circumstances that the second complaint should be entertained on the same facts; for instance, where the order of dismissal was manifestly perverse or foolish or was based on incomplete record. (*Coldstream J.*)

CHAMAN LAL & ANR. vs. EMPEROR

A. I. R. 1936 Lah. 47

Sec. 203—*Seizure of property for default of payment of instalment—complaint against the seizure and prayer for issue of search warrant—dismissal of complaint but order for search-warrant—validity of the order.*

The complainant purchased a sewing machine on a hire-purchase agreement, but there being default in payment of instal-

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ment, the Company removed the machine under the terms of the agreement. Thereupon the complainant filed a complaint before the magistrate and prayed for issue of a search-warrant. The Magistrate held that no criminal action would lie but issued a search warrant to recover the machine and to make it over to the complainant. Held, that the magistrate had no authority to make such an order. Having dismissed the application of the complainant he was not in a position to make an order for the issue of a search warrant or that the machine should be handed over to the complainant. (*Lort Williams & Jack JJ.*)

S. R. BAGNALL vs. MRS. DEANE & ORS.
62 C. L. J. 270

Sec. 203—*Person against whom complaint has been issued but process not issued, if an accused person—right of such person to sue for malicious prosecution.*

*A person of whose conduct complaint has been made is not an accused person, nor can be said to be a person prosecuted until process has issued. When a magistrate therefore after police enquiry refuses to issue process and dismisses the complaint, the person against whom the complaint was made cannot maintain a suit for damages for malicious prosecution against the complainant. (*Page C. J. & Mya Bu J.*)

GOWRI SINGH vs. BOKKA VENKANNA.
A. I. R. 1936 Rang. 96 = 13 Rang. 764

Sec. 204—*Before ordering accused to appear, preliminary enquiry, if should be held.*

Although a magistrate is entitled to admit a complaint and to make an enquiry upon it, still he would be exercising a wise discretion if he holds a preliminary enquiry before ordering an accused to appear before him. (*Mackney J.*)

MURUGAPPA CHATTIAN vs. K. P. R. M. RAMAN CHETTIAR.

A. I. R. 1936 Rang. 485

Secs. 208 (1) & (3)—*Prosecution if must produce all evidence before committing Magistrate.*

There is nothing in Secs. 208 (1) and (2) which makes the production of

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all evidence necessary in the Magistrate's Court. As soon as a Magistrate thinks that the prosecution has established a prima facie case it is unnecessary to call further evidence. (*Young C. J. Addi- & Monroe JJ.*)

MT. NIAMAT vs. EMPEROR

A. I. R. 1936 Lah. 533.

Secs. 208 & 219—*Evidence not produced before committing Magistrate, if can be produced by prosecution in the Sessions Court.*

The prosecution is not debarred from producing in the Sessions Court, evidence which it did not produce in the committing Magistrate's Court, but only those witnesses who were examined in the Magistrate's Court can be bound down to attend in the Sessions Court. In regard to witnesses who were not examined in the Court of the committing Magistrate, the prosecution, if it wants their evidence, must depend upon such witnesses being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under Sec. 540 of the Code, and summon such a witness. 55 All. 1040; 120 L. C. 539 & 134 L. C. 1230 relied on; 15 Lah. 331 dissented from. (*Young C. J. Addison & Monroe JJ.*)

MSST NIAMAT vs. THE CROWN

17 Lah. 176 = 38 P. L. R. 421 = A. I. R. 1936 Lah. 533.

Secs. 208 & 347—*Case triable by a Court of Session—commitment order by Magistrate, without recording entire prosecution evidence—legality of.*

A Magistrate enquiring into a case triable by the Court of Sessions or High Court, is not entitled under Sec. 347, Criminal Procedure Code to commit the accused to the Court of Sessions without recording the entire prosecution evidence, on the ground that it is apparent, before the prosecution evidence is closed that the case is one which ought to be tried by the Court of Sessions or High Court. He is bound to record the whole of the evidence for the prosecution under Sec. 208, Criminal Procedure Code and then commit. (*Sullai- man C. J., Harris & Bajpai JJ.*)

ASGHAR & ORS. vs. EMPEROR.

1935 A. W. R. 1493.

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Secs. 211 and 291—*Examination of witnesses not named in list furnished in committing Magistrate's Court—when may be allowed.*

The purpose of Sec. 211 is merely that the executive authorities should be able to compel the attendance of such witnesses as the accused wished to be summoned in order that when the trial of the case comes on in the Sessions Court the case may be heard from day to day and no time should be wasted. Secs. 211 and 291 read together clearly show that if the accused has willing witnesses at the Sessions Court he can be allowed to produce them, but if he requires the Court to issue process for compelling attendance he is confined to those witnesses whose names he has previously included, in his list of witnesses. (*Young C.J. Addison & Monroe JJ.*)

MT. NIAMAT vs. EMPEROR.

17 Lah. 176 = 38 P. L. R. 421 = 162 I. C. 976 = A. I. R. 1936 Lah. 533 = 1936 Cr. C. 568 = 37 Cr. L. J. 742

Sec. 221.—*Offence of rioting—charge if must contain the words "by force or show of force"*

It is not necessary to use the words by force or show of force in a charge under Sec. 147 I. P. C. as the word rioting which is included in the charge connotes force. (*Agarwallah & Madan JJ.*)

SURAJ DUSADH vs. EMPEROR.

1936 Cr. C. 1065 = A. I. R. 1936 Pat. 627. = 162 I. C. 945.

Sec. 222—*Charge under Sec. 405, I. P. C.—Particulars required to be stated.*

Sec. 405, Penal Code, refers to several classes of the offence of criminal breach of trust, such as dishonest mis-appropriation, dishonest conversion, dishonest user or disposal in violation of a direction of law, etc. Therefore a charge of committing an offence under the section must specify which of these offences was committed and must state by whom the alleged entrustment was made or who suffered from the alleged breach of trust. Unless these facts are specified, the charge is defective under

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Sec. 222 (1), Cr. P. Code. (*Lort Williams & Jack JJ.*)

ABINASH CH. SARKAR vs. EMPEROR.

63 Cal. 18 = 161 I. C. 280 = 37 Cr. L. J. 439.

Sec. 222—*Charge not specifying the date on which dishonest conversion of property was made, if defective.*

Where in a trial for criminal breach of trust under Sec. 409, I. P. C., the charge did not specify the date on which, or even the dates between which, the dishonest conversion of the property in question was made by the accused, but the charge merely stated the date on which the alleged conversion was discovered, held, that the charge did not comply with the provisions of Sec. 222, Cr. P. Code, and was therefore defective and bad in law. A conviction on such a vague charge was liable to be set aside. (*Broomfield & Wasoodew JJ.*)

EMPEROR vs. BABURAO TATYARAO.

36 Bom. L. R. 946 = 165 I. C. 867 = A. I. R. 1936 Bom. 379 = 1933 Cr. C. 924.

Secs. 233 & 235—*Theft in respect of two cattle belonging to two owner—Separate trial, if necessary.*

An accused should not be charged, tried and convicted under two separate trials merely because the two bullocks found in his possession belonged to two separate owners. The presumption is that they were lost at the same time and therefore one offence only was committed. (*Mosely, J.*)

NG, PO E vs. EMPEROR.

A. I. R. 1936 Rang. 94.

Sec. 235—*Person committing certain offences in pursuance of a conspiracy—joint trial, if legal.*

Where certain offences are committed in pursuance of a conspiracy, the offences can be said to form part of the same transaction within the meaning of Sec. 235, Cr. P. Code, and therefore persons who are parties to the conspiracy and concerned in the specific offences can lawfully be tried together. (*Derbyshire C. J. & Costello J.*)

RASHBEHARY SHAW vs. EMPEROR.

1936 Cr. C. 1043 = A. I. R. 1936 Cal. 753.

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Sec. 235—*Joint trial on charges of breach of trust, cheating, forgery and using forged ticket as genuine—legality of.*

The accused who was entrusted with the duty of selling water tickets issued in the form of books to the public, was charged with having caused spurious books to be printed and misappropriating the proceeds, thereby committing offences of breach of trust, cheating, forgery and using forged tickets as genuine. The evidence showed that 4100 spurious books were printed and delivered to the accused in batches between May 1933 and February, 1935. Objection was taken to the legality of the joinder of the four charges, and to the inclusion in the charge of alleged offences of forgery committed during a period of over two years. *Held*, that the charges against the accused in respect of the forgery of the ticket books during the period of May, 1933 to February, 1935 were illegal, and the illegality affected all the other charges, rendering the whole trial bad in law. (*Broomfield & Divatia JJ.*)

EMPEROR vs. SHAPURJI SORABJI.

60 Bom. 143 = 38 Bom. L. R. 106 = 37 Cr. L. J. 688 = 1936 Cr. C. 338 = 162 I.C. 399 = A. I. R. 1936 Bom. 154.

Secs. 235 & 239—*Conspiracy—acts committed by several persons in pursuance of conspiracy—joinder of trial if proper—principles of joinder of trial.*

Where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of such conspiracy, the several offences generally form part of the same transaction within the meaning of that expression as used in Sec. 235. This principle will also apply where the several offences are by different persons. It follows therefore that where there is a conspiracy and specific offences are committed in pursuance of such conspiracy, persons who are parties to that conspiracy and concerned in the specific offences can lawfully be tried in one and the same trial. (*Derbyshire C. J. & Costello J.*)

RASH BEHARI SHAW vs. EMPEROR.

1936 Cr. C. 103 = A.I.R. 1936 Cal. 753,

Criminal Procedure Code (Contd.)

Secs. 235 & 439—*Joint trial under Secs. 457 & 324/134, Penal Code, if legal.*

An offence under Sec. 457 and an offence under Sec. 324 read with S.c. 34, Penal Code, cannot possibly be considered to be part of one and the same transaction so as to allow of their being tried together. The joint trial of such offences, amount not merely to an irregularity, but to an illegality to be set aside by the High Court in revision. 23 Mad 61 relied on. (*Currie J.*)

BAIHALI & ANR. vs. EMPEROR.

38 P. L. R. 628 = A. I. R. 1936 Lah. 507, 162 I. C. 926 = 37 Cr. L. J. 722 = 1936 Cr. C. 512.

Sec. 235 (1)—*Tests for deciding whether different acts are part of the same transaction.*

In order to decide whether different acts are part of the same transaction or not within the meaning of Sec. 235 (1), Cr. P. Code, various tests have been indicated by the Court, viz, proximity of time, unity of place, unity or community of purpose or design and continuity of action. The main test, however, seems to be continuity of action, by which expression is meant the following up of some initial act through all its consequences and incidents until the series of acts or groups of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any of these things happens and the whole process is begun over again, it is not the same transaction, but a new one, in spite of the fact that the same general purpose may continue. (*Broomfield & Divatia JJ.*)

EMPEROR vs. SHAPURJI SORABJI.

60 Bom. 143 = 38 Bom. L. R. 106 = 37 Cr. L. J. 689 = 1936 Cr. C. 338 = A. I. R. 1936 Bom. 154 = 162 I. C. 399.

Sec. 236—*Scope of the section.*

Sec. 236, Cr. P. Code, deal with cases where there is a doubt as to the offence constituted by the facts of the case. The doubt must be a doubt as to the law applicable to a certain set of facts which have been proved. (*Mosely J.*)

ABDUL HAMID vs. EMPEROR.

14 Rang. 24 = 37 Cr. C. 271 = 161 I. C. 763 = A. I. R. 1939 Rang. 175.

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Secs. 236, 237 & 238 (1)—*Accused charged with offence under Sec. 457 I. P. C.—Conviction under Section 460, if permissible.*

In a case where it is doubtful which of several offences a person has committed he may be charged with all of them or with a number of them in the alternative, and convicted of that offence of which he is proved to be guilty, although in fact he was not specifically charged with that offence. Where an accused is charged under Sec. 457 I. P. C. and the facts proved establish an offence under Sec. 360, the accused can be convicted under that section though he was not specifically charged with that offence. (*Harries & Rachpal Singh JJ.*)

MATHURI vs. EMPEROR.

1936 A. L. J. 518=1936 A. W. R. 1.
1936 Cr. C. 401=37 Cr. L. J. 794=
163 I. C. 253=A. I. R. 1936 All. 337.

Secs. 236, 237 & 238—*Charge of cheating in pursuance of a conspiracy—conspiracy not proved—Conviction for cheating, if proper.*

When the accused is charged with the offence of cheating in pursuance of a conspiracy, but the conspiracy is not proved, the accused may be convicted of the offence of cheating if the same is proved against him, and the fact that the conspiracy is not proved does not render the conviction for cheating bad. (*Tyabji J.*)

EMPEROR vs. ABDUL RAHMAN.

60 Bom. 485=38 Bom. L. R. 153=37
Cr. L. J. 753=1936 Cr. C. 573=162
I. C. 950=A. I. R. 1936 Bom. 193.

Sec. 236, 237 & 403—*Several persons tried for affray—one of them, if can be tried for causing hurt, in the same trial.*

Where a number of persons are being tried for an affray, one of them cannot in the same trial be called upon to answer a charge of causing hurt under Sec. 323, Penal Code, because the offence of causing hurt in the course of an affray in the public street is an entirely distinct offence from the affray itself. The affray is committed not alone by the party causing the hurt but by both parties, viz., the party causing the

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hurt and the party receiving the hurt. When the two offences are connected with each other in that manner, the matter is governed not by Sub-Sec. (1), but by Sub-Sec. (2) of Sec. 403, Cr. P. Code. (*Dhavl J.*)

SANKATHIA RAI vs. KHADERAN MIAN

162 I. C. 29=37 Cr. L. J. 785=
16 Pat. L. J. 723=1936 Cr. C.
925=A. I. R. 1936 Pat. 503.

Sec. 238.—*Person charged under Sec. 307 I. P. C. if may be convicted under Sec. 323 I. P. C.*

A person charged with the graver offence of attempt to murder may be convicted of the lighter offence of causing hurt under Sec. 323 I. P. C., without a specific charge under that section. (*Niyogi A. J. C.*)

GANGABISHAN vs. EMPEROR.

19 N. L. J. 18

Sec. 238 *Joint trial of persons charged under Secs. 366 & 344 I. P. C. if can be charged with another person under Secs 368 and 344.*

Where one of the accused is charged with an offence under Secs. 366 & 344/109 I. P. C. and another accused is charged under Secs. 368 & 344 I. P. C., the two can legally be tried together if there is a community of interest or purpose between the two accused and if the acts were so closely connected as to form one and the same transaction. 50 Cal. 1004, 144 I. C. 93 & 136 I. C. 243 relied on (*Collister J.*)

PHOWANI PATHAK & ORS. vs. EMPEROR

161 I. C. 869=A. I. R. 1936 All. 253.

Sec. 238 (1) & (2) *Test of major and minor offence.*

The test by which an offence is deemed in Sec. (1), Cr. P. Code, to be major or minor is not the gravity of the punishment incurred. The sub section does not refer to the gravity of the punishment at all. It merely refers to the number of particulars constituting the offence. If a number of particulars is needed to constitute the offence, then for the purpose of Sec. 238 (1), it may be called the major offence; if a combination of some only of such particulars constitute a complete

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offence, then that offence is referred to in Sec. 238 (1) as the minor offence. It must not of course, be overlooked that sub-sec. 2 of Sec. 238 speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. (*Tyabji J.*)

EMPEROR vs. ABDUL RAHIMAN AKRAMDIN & ANR.

60 Bom. 485 = 162 I. C. 950 = 37 Cr. L. J. 758 = 38 Bom. L. R. 153 = 1936 Cr. C. 573 = A. I. R. 1936 Bom. 193.

Sec. 239—*Several persons charged with one conspiracy—Unrelated conspiracy proved—Trial, if bad.*

Where there is one large conspiracy involving several persons but only a number of unrelated conspiracies are proved, the trial would be bad for misjoinder of parties under Sec. 239 Cr. P. Code, although prima-facie on the prosecution case as alleged, the joinder may be quite legal. (*Gruer J.*)

MOHAMMAD ISMAIL & ORS. vs. EMPEROR.

A. I. R. 1936 Nag. 97.

Sec. 239 (a)—*Joinder of charges—identity of time not essential.—Bottling of liquor with intent to sell—actual sale—if constitutes same transaction.*

In determining whether certain events form the same transaction or not, what has to be looked to is rather continuity of action and unity of purpose. The bottling of liquor with intent to sell, and the sale of liquor forms part of the same transaction, and persons concerned in the bottling and in the sale are liable to be tried jointly. 4 N. L. R. 71, 2 N. L. R. 147 and 143 I. C. 17 referred (*Gruer J.*)

CHOTEY MIAN vs. EMPEROR.

A. I. R. 1936 Nag. 250

Sec. 239 (d)—*False verification in pleadings made by two brothers—Perjury in witness box, by one in the same trial—whether joint trial proper.*

Where the offence of verifying a false statement was one done jointly by two brothers in pursuance of a common object, and one of them committed perjury in the wit-

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ness box, it cannot be doubted that the offences committed in course of the same trial were part of the same transaction, and the two brothers could be tried jointly. 51 Bom. 310, 13 N. L. R. 85, 10 Cal. 405 and 6 Mad. 252 referred (*Gruer J.*)

NATHUSINGH GANPATISINGH RAJPUT vs. EMPEROR.

A. I. R. 1936 Nag. 263 = 1936 Cr. C. 1025

Sec. 239 (d)—*Persons rescuing others from lawful custody if can be jointly tried with them.*

Where a person escapes from lawful custody with the help of certain other persons, the rescuers can be tried along with the person escaping. The intention of all being to secure the release of the man in lawful custody, the various acts which brought about the escape must be deemed to form part of the same transaction as contemplated by Sec. 239 (d) Cr. P. Code, and therefore the joint trial of the person escaping and the rescuers is perfectly legal. (*Varma & Rowland JJ.*)

AJAB LAL RAI & ORS. vs. EMPEROR.

15 Pat. 138. = 16 P. L. T. 748

Sec. 239 (e)—*Joint trial—Persons accused under Sec. 457 or 460 I. P. C. if may be tried together.*

Neither Sec. 457 nor Sec. 460 I. P. C. covers an offence of theft, though both the offences must frequently be followed by theft & often form part of a larger transaction involving or including theft. But Sec. 239 (e) Cr. P. Code only permits persons to be charged and tried together when one set are charged with an offence of which theft is a necessary and essential ingredient while the other are charged with receiving or assisting in the disposal or concealment of property, possession of which is alleged to have been transferred by the offence with which the first set are charged. That being so, persons charged under Secs. 457 and 460 I. P. C. cannot properly be tried with persons charged with receiving stolen property which was stolen in a theft committed as part of the transaction involving the other offence. (*Harries & Rachhpal Singh JJ.*)

EMPEROR vs. MATHURI & ORS.

A. I. R. 1936 All. 337 = 1936 A. L. J. 516.

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Sec. 239 (6)—Separate offence of theft—Person in possession of the stolen properties, if can be jointly tried.

If more than one offence of theft has been committed in respect of certain property which could be designated as stolen property within the meaning of S. 410, I. P. O., then the person in possession of such stolen property which has been secured by means of the commission of several offences of theft or robbery, etc., cannot be tried jointly according to the provisions of Cl. (f) of S. 239 of the Code. The general principle is that it is always necessary to justify a joint trial and to point out provisions under which it can be held. Separate trial is the rule and joint trial is the exception, and such a joint trial can only be justified if the provisions of Sec. 239, Cr. P. Code can be applied. (*Nanavutty J.*)

BHAGGAN vs. EMPEROR

11 Luck. 70.

Secs. 239 & 537—Misjoinder of persons contrary to sec. 239,—defect, if curable.

The misjoinder of persons contrary to Sec. 239 Cr. P. Code is not a mere irregularity but is illegal; but even so, if such misjoinder has not in fact occasioned injustice, the defect is curable by Sec. 537 of the Code. (*Harris & Rachhpal Singh JJ.*)

MATHURI & ORS. vs. EMPEROR.

1936 A. W. R. 1=163 I. C. 253=37 Cr. L. J. 794=1936 A. L. J. 518=1936, Cr. C. 401=A. I. R. 1936 All. 337.

Secs. 239 & 537—Irregularity in holding joint trial, if vitiates the trial.

It is not every breach of any provision in the Cr. P. Code that amounts to an illegality and vitiates the trial. Where the irregularity committed in holding a joint trial has not occasioned a failure of justice nor has it prejudiced the accused in his defence, the whole trial is not illegal. (*Nanavutty, J.*)

BHAGGAN vs. EMPEROR.

11 Luck. 70.

Sec. 242—Duty of the Magistrate under the section—effect of non compliance with the provisions of the section.

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Non-compliance with the provisions of Sec. 242, Cr. P. Code vitiates the trial. A detailed note of the proceedings is not required to be recorded in the order sheet, but the Magistrate must indicate that both parts of the section were complied with. The failure to comply with one of the parts is sufficient to render the trial illegal and not merely irregular so as to be curable by Secs. 535 & 537 of the Code. (*Varma J.*)

BHUBANESWAR PRASAD vs. EMPEROR.

17 P. L. T. 609=165 I. C. 844=1936, Cr. C. 823=A. I. R. 1936 Pat. 501.

Sec. 246. Accused charged with offence triable as summons case—evidence disclosed offence triable as warrant case—Magistrate taking cognisance as summons case if can convert case into warrant case.

Once a magistrate has taken cognisance of an offence which is triable only according to the procedure applicable to summons case, he can, under no circumstances, proceed against the accused person for a more serious type of warrant case. (*King J.*)

RAJRATANAM PILAI, IN RE.

70 M. L. J. 340=1936 M. W. N. 181=43 M. L. W. 367=A. I. R. 1936 Mad. 341=161 I. C. 846=1936 Cr. C. 384.

Sec. 247.—Summons case—Personal presence of complainant, if necessary—duty of Magistrate when complainant absent.

Under Sec. 247, Cr. P. Code, the personal presence of a complainant, except when he is a public servant, is necessary in order that a summons case should proceed. Where in a summons case, the complainant does not appear on the date fixed for the hearing of arguments but is represented by Counsel, there are two courses open to the magistrate—either to acquit the accused or to adjourn the case. If he exercises his discretion not to allow an adjournment and acquits the accused, and there is no reason for holding that he acted wrongly, the acquittal cannot be interfered with in revision. (*Allsop J.*)

EMPEROR vs. RUSTOM SINGH.

1936 A. W. R. 843=1936 A. L. J. 957=A. I. R. 1936, All. 658=164 I. C. 484.

Criminal Procedure Code (Contd.)

Sec. 250.—*Compensation directed to be paid by Municipal Committee, without giving such Committee opportunity of explaining—order liable to be set aside.*

Where a complaint by a Municipal Committee against a resident for erecting an unauthorised structure, was dismissed and the Magistrate directed the Committee to pay compensation under Sec. 250, Cr. P. Code, without giving it an opportunity to explain why compensation should not be awarded, *held*, that the mandatory provisions of Sec. 250 had not been complied with, and the order was liable to be set aside, more so, as the action of the Committee in launching the prosecution could not be said to be grossly careless or vindictive. (*Skemp J.*)

NEW DELHI MUNICIPAL COMMITTEE vs. RAM BAI.

A. I. R. 1936 Lah. 702 = 164 I. C. 368 = 37 Cr. L. J. 935 (2) = 38 P. L. R. 886 = 1936 Cr. C. 719.

Sec. 250.—*Duty of Magistrate to record all evidence of complainant before proceeding under Sec. 250.*

It is necessary that the evidence which the complainant wishes to adduce should be gone into before the Court makes a decision to proceed under Sec. 250, Criminal Procedure Code. An order passed without doing so, even if not illegal, is highly undesirable in the interests of justice. (*Mir Ahmad A. J. C.*)

GULDIN vs. ABDUL KHALIQUE & ORS.
A. I. R. 1936 Pesh. 178.

Sec. 250.—*Compensation when should be awarded.*

The language of Sec. 250, Cr. P. Code makes it clear that compensation can be awarded thereunder only if the accusation was false, and either frivolous or vexatious. If the accusation is proved to be false but cannot be regarded as frivolous or vexatious, the section does not justify the award of compensation. If the accusation is not proved to be false, no compensation can be awarded however frivolous or vexatious the conduct of the complainant might have been. (*Niamatulla J.*)

BACHAN PROSAD vs. JHURI & ORS.

1936 A. W. R. 188, = 1936 A. L. J. 189 = 1936 Cr. C. 427 = 37 Cr. L. J. 424 (2) = A. I. R. 1936 All 363.

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Sec. 250.—*Order for payment of compensation under the section—Reasons to be recorded.*

The reason to be recorded by a magistrate passing an order for payment of compensation under Sec. 250, Cr. P. Code, are the reasons why he directs compensation to be paid and not why he records the complaint as false, frivolous or vexatious. Such reasons having got to be recorded under Sec. 250, it is beyond the power of the magistrate to discover why complainant made a false case. (*Baguley & Mosley JJ.*)

MA SING vs. MAUNG MAUNG LAY & ANR.

A. I. R. 1936 Rang. 230 = 14 Rang. 378 = 163 I. C. 163 = 37 Cr. L. J. 773 = 1936 Cr. C. 514.

Sec. 250.—*Order discharging accused on the ground that case is false—Order typed by magistrate and signed by him—Further order directing payment of compensation typed on the same date with same typewriter—Two orders if to be deemed part of one and the same order.*

An order discharging an accused of an offence under Sec. 376, Penal Code, on a finding that the case was a false one was typed by the magistrate and signed by him. Running straight on the same date with the same typewriter and obviously done all in one place, was an order under Sec. 250, Cr. P. C., directing the complainant to show cause why he should not pay compensation to the accused discharged. *Held*, that the judgment containing the order of discharge and the further order granting compensation were one and the same order and the intrusion of the magistrate's signature in the middle of the page could not affect the merits of the case. (*Baguley & Mosley JJ.*)

MA SIN vs. MAUNG LAY & ANR.

A. I. R. 1936 Rang. 230 = 14 Rang. 378 = 163 I. C. 163 = 37 Cr. L. J. 773 = 1936 Cr. C. 513.

Sec. 255 A.—*Proper procedure under the Section.*

The procedure prescribed in Sec. 255A, Cr. P. Code, if strictly complied with is rather inconvenient, though not impossible to follow. What however the section says

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is clear. It means that the Magistrate should first write out a judgment of conviction without passing sentence. Then, if the accused had denied previous conviction, he should proceed, to take evidence to prove it. (*Khaja Mohammed Noor J.*)

ISWAR SINGH & ORS. vs. SHAMA DUSADH & ORS.

17 P. L. T. 627.

Sec. 256 (1)—"Any remaining witnesses" meaning of.

A witness whose name is not given in the list of witnesses submitted under Sec. 252 (2) Cr. P. C. does not come under the description "any remaining witnesses" in Sec. 256 (1) and the prosecution has no right to examine such a witness at that stage (*Bennet J.*)

RAGHUBIR SAHAI vs. WALI HUSAIN KHAN.

1936 A. W. R. 886=1936 A. L. J. 1115

Sec. 256. (2)—Admission of guilt by accused in written statement—when may be acted upon.

When the prosecution has proved that one of the accused persons has inflicted the fatal blow, the Court may look into and consider a written statement, which contains an admission by one of the accused that he had struck the fatal blow.

(*Skemp J.*)

HASHAM vs. EMPEROR.

37 Cr. L. J. 438=1936 Cr. C. 11=A. I. R. 1936 Lah. 28

Sec. 257.—Accused summoning expert witness—Court may enforce attendance and pay reasonable dues.

A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The Court therefore should not hesitate in exercising its powers under the law; however highly placed a witness may be. An accused person should not be burdened with the costs of an expert, if his demand is unreasonable, especially when the Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues 33 P. L. R. 811: 108 I. C. 907

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& 117 I. C. 667 relied on (*Din Mahammad J.*)

PARSHOTTAM DAS vs. EMPEROR.

38 P. L. R. 1165=1936 Cr. C. 1007=A. I. R. 1936 Lah. 919.

Sec. 257.—Cross examination of prosecution witnesses, by accused—Magistrate may refuse to recall such witness when accused has declined to cross examine once.

After the charge was framed the Magistrate called up one by one all the prosecution witnesses and the accused asked them no questions. On the date fixed for arguments the accused engaged a Counsel who requested the Magistrate to recall all the prosecution witnesses for cross-examination. The Magistrate refused,

Held, he was entirely justified in so doing. (*Skemp J.*)

KHUDA BUKSH vs. EMPEROR.

A. I. R. 1936 Lah. 914.=17 Lah. 284=38 P. L. R. 630=1936 Cr. C. 1823=165 I. C. 919.

Sec. 260.—Magistrate not trying offence summarily under Sec. 260 Cr. P. C.—Record of evidence in language of Court, if necessary.

Where a Magistrate does not try an offence summarily under Sec. 260 Cr. P. C. but tries it in the ordinary course, he is not required to record the evidence in the language of the Court or have it so recorded. (*Allsop J.*)

HAFIZ MOHAMMAD RAFIQ AHMAD vs. EMPEROR.

1936 A. W. R. 375=1936 A. L. J. 274=37 Cr. L. J. 719=162 I. C. 758

Secs. 263 & 324 Summary trial—omission to examine the accused and record his statement if a fatal defect.

Sec. 342 of the Cr. P. Code relating to the examination of the accused after the examination of the prosecution witnesses applies also to summary trial. The words "if any" in cl. (g) of Sec. 263 do not imply that it is optional to the Magistrate in a summary trial to examine the accused or not, but merely imply that when the accused has made a statement, particulars of his statement, should be noted. The mere fact, that no other statement of the accused, beyond the plea of not guilty has

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been recorded by the magistrate in a summary trial would not show that the accused was never questioned at all. (*Sulaiman C. J. & Ganganath J.*)

EMPEROR vs. SIA RAM & ORS.

57 All. 666.

Sec. 269 (3)—*Charge of main offence triable by jury and of conspiracy to commit same not so triable—verdict of not guilty in respect of all—conviction, if maintainable.*

Where the accused is charged at the same trial with some offences which are triable by jury and some which are not, there is no illegality in holding the whole trial with the same set of jurors and treating their verdict on the latter offences as a verdict of assessors. But where the charge being of certain main offences triable by jury and of conspiracy to commit those offences which is not so triable, the jury return a verdict of "not guilty" in respect of all and the judge, after acquitting the accused of the main offences in agreement with the verdict, convicts them of conspiracy in accordance with his own opinion and without giving any reasons, disregard the verdict as that of assessors, the conviction is not sustainable. (*Cunliffe & Henderson JJ.*)

JOGNESWAR GHOSE & ORS vs. EMPEROR.

40 C. W. N. 1186 = A. I. R. 1936 Cal. 527 = 1936 Cr. C. 737.

Sec. 269 (3)—*Trial by same set of person as jurors and assessors respectively in regard to different charge, impropriety of—verdict of not guilty on charges triable by jury accepted—opinion of some person acting as assessors, in favour of acquittal on other charges also—conviction by Judge of latter, propriety of.*

The holding of a trial with aid of the same set of persons, once acting as jurors in respect of certain charges and again acting as assessors in respect of certain other charges, is undesirable and unfair though it is permitted by the Cr. P. Code. When in such a case the jury acquits the accused of the first set of charges, and the verdict is accepted and they also hold in favour of the accused, acting as assessors,

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in respect of the other charges, the judge acts improperly in rejecting the opinion of the assessor and convicting the accused of the second set of charges, when, having regard to the nature of the charges, he by so doing practically sets aside the verdict of the jury on the first set of charges (*Cunliffe & Henderson JJ.*)

CHERC SHEIK vs. EMPEROR.

40 C. W. N. 1374.

Sec. 269 (3)—*Joint trial for offence of which some triable by jury and the other with the aid of assessors—effect of the verdict of the jury.*

Where some offences triable by jury and others triable with the aid of assessors are tried together, and the accused convicted, and subsequently the convictions in respect of the offences triable by jury is set aside, it does not necessarily follow that the offences for which the accused have been tried with the aid of assessors must also be set aside, even though the evidence recorded was common to all the offences 2 A. W. R. 1167 relied. (*Srivastava J.*)

SATDEO vs. EMPEROR.

1936 O. W. N. 28. 159 I. C. 919 = 37 Cr. L. J. 182 = 1936 Cr. C. 382 = A. I. R. 1936 Oudh. 164.

Secs. 276 & 326—*Jury discharged on objection by accused to one member—fresh jury, empanelled but out of persons summoned from locality—such jury, if properly constituted.*

Where a trial being taken up with a jury, the accused objected to one of them, and thereupon the jury was discharged, and the judge, after summoning certain persons from the locality, empanelled a new jury out of them the accused not objecting, *Heid* that Sec. 326, Cr. P. Code, had no application. The jury so constituted, had jurisdiction to try the case and in the absence of any prejudice caused to the accused their verdict could not be questioned. (*Cunliffe & Henderson JJ.*)

FURTA BIBI vs. EMPEROR.

40 C. W. N. 1411.

Secs. 278 (h) & 279—*Complaint of misconduct against jurors—Discretion of the Judge to hold an enquiry.*

There is no provision in the C. P. Code

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for holding an enquiry into the alleged misconduct of a juror. The Sessions Judge has jurisdiction to hold such an enquiry but the question whether he should or should not hold such an enquiry is a matter within his discretion. The Sessions Judge in refusing to hold an enquiry into allegations of misconduct against the jury cannot be said to have exercised a wrong discretion so as to make his decision liable to be revised by the High Court. (*King C. J.*)

BIDESHI & ORS. vs. EMPEROR.

1936 O. L. R. 202 = 1936 O. W. N. 457
162 I. C. 705 = 37 Cr. L. J. 749 = 1936
Cr. C. 628 = A. I. R. 1936 Oudh 268.

Secs. 278(h) & 279—*Trial by jury—juror expressing opinion before delivery of charge—Trial, if vitiated.*

If a juror expresses his opinion before the Judge has delivered his charge to the jury, the Sessions Judge should discharge the jury and hold a fresh trial with a fresh jury. 25 C. W. N. 240 relied on (*King C. J.*)

BIDESHI & ORS. vs. EMPEROR.

1936 O. L. R. 202 = 1936 O. W. N. 457
162 I. C. 705 = 37 Cr. L. J. 749 = 1936
Cr. C. 625 = A. I. R. 1936 Oudh. 268

Sec. 288—*Evidence recorded under Chap. XVIII—admission of such evidence by Sessions Court—Value of such evidence.*

There is nothing in Sec. 288, Criminal Procedure Code to show that there need be corroboration of the evidence so recorded. Evidence recorded in this manner in the Sessions Courts is precisely the same as any other evidence. It has like other evidence to be examined with care, and should be considered together with all the other surrounding circumstances. The Judge or Jury as the case may be, must make up their minds whether the evidence is to be believed or not, and if it is believed, what value has to be placed upon it. No general law can be laid down as to this. The evidence must be judged as all evidence must be according to the facts of each particular case. But there is no difference in law between the evidence of this sort and any other evidence. (*Young C. J. & Monros. J.*)

NARINJAN SING vs. EMPEROR.

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169 I. C. 379 = A. I. R. 1936 Lah. 357.
17 Lah. 419 = 37 Cr. L. J. 567 = 38 P.
L. R. 820 = 1936 Cr. C. 298.

Sec. 297—*Offence under Sec. 395—Facts, if must be pointed out by the judge in his charge to Jury.*

In a trial under Sec. 395, Penal Code, where the guilt of the accused depends entirely upon the identification of the accused it is essential for the trial Judge to point out in his charge to the jury the shortcomings of the prosecution witnesses as also the evidence upon which the prosecution relies, for example, non-recovery of stolen property from the possession of any of the accused or non-existence of the names of the accused in the First Information Report. (*Nanavutty J.*)

BIRARI & ORS. vs. EMPEROR.

1936 O. W. N. 187 = A. I. R. 1936
Oudh. 223

Sec. 297—*Charge to Jury—Summing up of evidence by Judge is mandatory.*

It is mandatory upon a judge to charge the Jury, and in so doing, to sum up the evidence for the prosecution and defence and to lay down the law. It is no doubt legitimate for a judge to ask the jury whether they have a particular piece of evidence in mind, or whether it would help them for him to read his notes on the subject, but it is not necessary for him to go through the whole of the evidence. (*Beaumont C. J. Broomfield & Wadia JJ.*)

PUTTAN HASSAN & ANR. vs. EMPEROR.

60 Bom. 599 = 39 Bom. L. R. 19 = 1936
Cr. C. 164 = 37 Cr. L. J. 366 = A. I. R.
1936 Bom. 52. = 160 I. C. 1060.

Sec. 297—*Offence under Sec. 366 I. P. C.—Conviction on uncorroborated testimony of girl is improper—Omission to warn jury is misdirection.*

In a case of prosecution for rape the Judge should direct the jury on the question of the necessity of corroboration and warn them about the danger of convicting the accused on the girl's evidence alone. Omission to do so is misdirection. (*Lort-Williams & Cunliffe JJ.*)

CHAMUDDIN SARDAR vs. EMPEROR.

1936 Cr. C. 110 = 37 Cr. L. J. 359 = 160
I. C. 1028 = A. I. R. 1936 Cr. L. 18.

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Secs. 297 & 298—*Manner in which charge to the jury should be recorded.*

Although under the law, the judge is not bound to record the very words in which he explains the law to the jury, yet it is desirable that there should be a substantial record of what the judge told them in explaining to them the law applicable to the case. (*Zia-ul-Hassan J*)

WAJID HOSSAIN vs. EMPEROR.

1936 O. W. N. 201.

Sec. 298—*Charge to the Jury—Judge, if may express his own opinion on the evidence.*

It is the duty of the Judge to help the jury to come to a right conclusion, and for this purpose he is entitled to express his own opinion on the evidence. So long as he qualifies his observations with the remarks that the members of the jury are the sole judges of the facts, and they are not bound by any opinion on the fact expressed by him, there can be no such defect as to vitiate the charge. (*Srivastava, J.*)

SATDEO vs. EMPEROR.

1936 O. W. N. 28. = 159 I.C. 919 = 37 Cr. L. J. 182 = 1936 Cr. C. 282 = A. I. R 1936 Oudh 164.

Sec. 298.—*Charge to Jury—Judge may express his opinion freely with proper warning.*

A trial judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to be necessary to do so provided that he warns the jury that his opinion is in no way binding upon them, and that it is the jury's opinion on the facts of the case alone which matters. (*Bassey C. J. & King J.*)

RATANSABAPATHY GOUNDAN vs. THE PUBLIC PROSECUTOR, MADRAS.

59 Mad. 904 = 71 M. L. J. 231 = 44 M.L. W. 155 = 1936 M. W. N. 459 = 1936 Cr. C. 635 = 87 Cr. L. J. 909 = 164 I.C. 243 = A. I. R. 1936 Mad. 515.

Sec. 298 (2)—*Trial by Jury - extent to which judge in his charge may express his opinion.*

Though Sec. 298 (2). Cr. P. Code authorises the Judge to express to the jury his

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own opinion upon any question of fact in the course of summing up, if he thinks proper, it is an established rule that the judge should at the same time give the jury to understand that they are not bound by his opinion and should form an independent opinion of their own on questions of fact. The opinion expressed by the judge should not be anything more than a mere expression of opinion, and any assumption on his part about the guilt of the accused would be highly improper and must be deemed to be prejudicial to the accused. (*Zia-ul-Hussan. J.*)

WAJID HASSAIN vs. EMPEROR.

1936 O. W. N. 209.

Sec. 298 & 299—*Function of Judge & Jury as to confession.*

It is the function of the Judge to decide as a matter of law whether or not a confession is competent evidence, that is to say, whether or not it is within the prohibition of Sec. 24 of the Evidence Act which excludes statements obtained by threat or inducement by a person in authority. But after a confession has been admitted by the Judge in evidence, it is the function of the Jury to decide whether the confession is true and in doing so, they may, and indeed necessarily must consider for themselves whether it was voluntary or induced. The first function cannot be left to the jury; nor can the second be withdrawn from them whether in law or as a practical proposition. (*Cunliffe & Henderson JJ.*)

EMPEROR vs. BHAKTA BHUSAN PRAMANICK & ANR.

63 C. L. J. 142 = 40 C. W. N. 668.

Sec. 298 & 299—*Function of Jury as to confession.*

It is the function of the Judge to consider the admissibility of a confession; it is the function of the Jury to weigh the same. Accordingly, whether or not a confession was voluntarily made has first to be determined by the Judge as a question of law and solely as a condition precedent to its admission; but after the confession has been admitted in evidence, it is for the jury to determine the weight to be given thereto and in doing so they are within

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their province in determining and indeed must determine for themselves whether the confession was voluntarily made—and thus on the same facts upon which the Court declared the confession to be voluntary, and other facts, if any. It is further misdirection to tell the Jury that once a confession has been admitted in evidence it is no part of their duty to decide whether it was voluntarily made. (*Derbyshire C. J., Costello & M. C. Ghose JJ.*)

BADAN ALI vs. EMPEROR.

40 C. W. N. 724 = 63 Cal. 833 = 165 I. C. 127 = 37 Cr. L. J. 1084

Sec. 303.—*Duty of Judge to question jury to elicit a proper verdict—Jury's verdict that accused uttered forged notes—No opinion that accused had knowledge of notes being forged—verdict held incomplete.*

Sec. 303 Cr. P. C. provides for the judge asking the jury necessary questions in order to ascertain what their verdict is. Where in a trial under Sec. 489-B I. P. C. the jury expressed their opinion about the fact of the notes having been uttered by the accused being proved, but did not express any opinion as to whether the accused knew or had reason to believe that the notes were forged, their verdict is no doubt inconclusive and incomplete. The Judge should ascertain from them, by proper questions, their opinion as to whether the notes had been uttered with the knowledge of their being forged. 7 C. W. N. 135 referred. (*Srivastava J.*)

SATDEO vs. KING. EMPEROR.

1936 O. W. N. 28 = 1936 Cr. C. 282 = 37 Cr. L. J. 182 = 159 I. C. 919 = A. I. R. 1936 Oudh 164

Sec. 307.—*Reference if may be made when a pure question of fact involved.*

Where a case depends entirely on the statement of an approver and on the retracted confession of an accused which is of a non-incriminating nature, and the jury comes to the conclusion that the evidence is not sufficiently corroborated and hence gives a verdict of not guilty, it is proper that the Sessions Judge should refer the case to the High Court under Sec. 307, Cr. P. Code

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because, this question involved being a pure question of fact, the verdict of the jury must be regarded as conclusive. (*Cunliffe & Henderson, JJ.*)

EMPEROR vs. GOSTHO SARDAR & ORS.

A. I. R. 1936 Cal. 407 = 15 I. C. 438 = 37 Cr. L. J. 1149 = 1936 Cr. C. 670.

Sec. 307. *Verdict of jury, when can be set aside.*

If persons are put on their trial before juries on questions of fact, the decisions of the jury should always be accepted unless it is possible to demonstrate that the acquittals have been arrived at perversely. It should be shown unmistakably that the jury failed to do their duty in considering the evidence brought before them properly. (*Cunliffe & Henderson JJ.*)

EMPEROR SHERALI BADIYAKAR.

63 C. L. J. 140

Sec. 307.—*Reference to High Court when may be made.*

It is not necessary that the Judge must be satisfied that the verdict is perverse before making such reference. It is sufficient that he should be clearly of opinion that the reference is necessary in the interest of justice. 23 C. W. N. 747 relied. (*Grille & Gruer J.*)

SAKHAWAT vs. CROWN.

19 N. L. J. 320.

Secs. 337 & 494 (a).—*Court if may allow prosecution to be withdrawn against accused for the purpose of obtaining his evidence.*

The Court may consent to public prosecutor withdrawing from the prosecution of any person under Sec. 494 (a), Cr. P. Code, for the purpose of obtaining his evidence against others placed on trial along with him and can do so even in a case to which Sec. 337, Cr. P. Code applies. (*Derbyshire C. J., Panckridge M. C. Ghose & Bartley JJ., Mukherjee J., party dissenting.*)

HARIHAR SINHA & ORS. vs. EMPEROR.

40 C. W. N. 876. 163 I. C. 9 = 37 Cr. L. J. 758 = 63 C. L. J. 307 = 1936 Cr. C. 583 = A. I. R. 1936 Cal. 356 (F. B)

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Sec. 337 & 494 (a)—*Court if may or ought to allow prosecution to be withdrawn against accused for the purpose of obtaining his evidence in a case where Sec. 337 applies.*

Per Derbyshire C. J., M. C. Ghose & Bartley J.J. Where Sec. 337, Cr. P. Code, is applicable, the better course for the Court is to proceed under that section rather than allow the prosecution to be withdrawn under Sec. 494 (a) *Per Panckridge J.* Where Sec. 337 (1) is applicable and the Magistrate can grant conditional pardon thereunder, it would be, as a general rule, wrong exercise of discretion to permit withdrawal of the prosecution before the charge is framed, i. e., under Sec. 494 (a). *Per Mukherjee J.* The Court may allow the prosecution against a person to be withdrawn under Sec. 494 (a) Cr. P. Code, for the purpose of obtaining his evidence against his co-accused except in cases where Sec. 337 may be availed of.

HARIHAR SHINA & ORS. vs. EMPEROR.

40 C.W.N. 876 = 163 I.C. 9 = 37 Cr.L.J. 758 = 63, C. L. J. 307 = 1936 Cr. C. 583 = A. I. R. 1936 Cal. 356 (F. B.)

Sec. 339—*Certificate under—who may grant—what it should contain.*

The person who is authorised to grant a certificate under Sec. 339 Cr. P. C. is the Public Prosecutor who conducted the case in which the pardon was granted and he need not necessarily occupy the position of Public Prosecutor on the date on which he grants the certificate. It is not required that any particulars should be given in the certificate. (*Monroe & Rangil Lal J.J.*)

INDAR PAL vs. EMPEROR.

1936 Cr. C. 389 = 37 Cr. L. J. 732 = 162 I. C. 969 = A. I. R. 1936 Lah. 409

Sec. 342.—*Examination of accused—when to be done.*

The accused shall be examined after the witnesses for the prosecution have been examined and the accused has been called upon to enter upon his defence. The section requires the accused to be examined at a stage when he knows all that

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the witnesses are going to say against him. (*Allsop J.*)

HAFIZ MD. RAFIQ AHMED vs. EMPEROR.

1936 A. W. R. 375.

Sec. 342—*Duty of the Court to put to the accused the various points against him.*

It is no doubt the duty of the Court to put to the accused the various points against him, and the filing of a written statement does not abrogate that duty. But when the Court wanted to put questions, but the accused practically refused to answer them, saying that he would give his statement later on and that he had nothing to say beyond what he stated in his written statement, *held*, that in the circumstances it could not be said that the accused had been prejudiced and the validity of the conviction could not be questioned on that ground. (*Gruet J.*)

G. S. RAMESHAN vs. EMPEROR.

A. I. R. 1936 Nag. 147 = 1936 Cr. C. 689

Sec. 342—*Duty of Court to put specific questions regarding circumstances appearing against accused.*

Although it is not necessary or practical for a trial judge to put to an accused every piece of evidence or point which has been given or made against him it is the duty of the Judge under Sec. 342, Cr. P. Code to call the attention of the accused to matters from which, in absence of any explanation, adverse inferences can be drawn against him and call for explanation from him. Failure on the part of the Court to do so vitiates the trial. 64 M.L. J. 466; 3 P. L. T. 469 approved. (*Beaseley C. J. & Gentle J.*)

SANGAMA NAICKER & ORS. vs. EMPEROR.

59 Mad. 622 = 71 M. L. J. 138 = A. I. R. 1936 Mad. 715 = 165 I. C. 743 = 44 L. W. 52 = 1936 M. W. N. 631 = 1936 Cr. C. 818.

Sec. 342—*Gaps in prosecution case, if may be filled up by statements by accused.*

In a Criminal trial, the prosecution must make out its own case, and the gaps cannot be filled up by any statements made by the accused in his examination under Sec.

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342, Cr. P. Code. But voluntarily written statements by the accused can be used for the purpose, (*Skemp J*)

HASAM & ORS, EMPEROR.

A. I. R. 1936 Lah. 28

Sec. 342—*Examination of the accused under the provisions of the section, if obligatory.*

The examination of the accused under Sec. 342 Cr. P. Code is obligatory and the wording of the section does not justify the conclusion that the accused should be examined under the section only if he offers to produce evidence. Prejudice to the accused may be presumed in a case in which he has not been examined under Sec. 342 of the Code, but the presumption is always liable to be rebutted. (*Zia ul-Hassan J.*)

EMPEROR vs. BRIJ LAL.

160 I. C. 489 = 37 Cr. L. J. 408 = 1936 O. W. N. 215

Sec. 342—*Circumstantial evidence—Accused should be asked to explain important circumstances—Omission to so ask.*

Where the evidence against the accused is not direct but entirely circumstantial, it is necessary that the circumstances which if unexplained would lead to conviction should be pointed out to the accused by the Court, so that he may have an opportunity to give his explanation if any in regard to them. The failure to comply vitiates the trial, (*Wadsworth & Menon JJ.*)

CHINNU vs. EMPEROR.

1936 M. W. N. 783 = 37 Cr. L. J. 1107 = 1936 Cr. C. 762 = A. I. R. 1936 Mad. 636 = 165 I. C. 192.

Sec. 342—*Evidence against accused entirely circumstantial—Duty of judge to call for explanation.*

It is not fair that the accused's case should be decided on circumstantial evidence in the absence of an explanation from him about the points that were urged against him by the prosecution and regarded by the learned judge as important or vital. (*Burn and Pandurang Row JJ.*)

IN RE KIMIDI NABASIMHAM.

Criminal Procedure Code (Contd.)

1936 M. W. N. 521 = 1936 Cr. C. 763 = 37 Cr. L. J. 1078 = 164 I. C. 1017 = A. I. R. 1936 Mad. 629.

Sec. 342—*Statement by accused—Court must consider as a whole—portion exculpatory cannot be excluded.*

If a statement made by the accused is to be taken against him in order to show he was present at the time of the fight and took part in it, the whole of his statement should be taken and not merely the inculpatory part of it to the exclusion of the exculpatory part raising the plea of self-defence, (*Agha Haidar & Skemp JJ.*)

AHMED vs. THE CROWN.

38 P. L. R. 105

Sec. 342 & 364—*Examination of accused—necessity of—written statement filed by accused value of.*

Every piece of circumstantial evidence tending to incriminate the accused should be pointedly brought to his notice either by the committing magistrate or, in the last resort, by the trial Judge in the Court of Session, and the answers of the accused to those questions recorded, as far as possible, in his own words by the Court. Written statements filed on behalf of accused persons are generally evolved out of the brains of the counsel for the accused helped by the friends of the accused and little importance should be attached to them. (*Nanavutty & Smith JJ.*)

MOHAMMED ANIS vs. EMPEROR.

1936 O. W. N. 691 = 164 I. C. 482 = 37 Cr. L. J. 955 = 1936 Cr. C. 1086 = A. I. R. 1936 Oudh 405

Secs. 342 & 435—*Charge under Secs. 147, 323, 325 457, Penal Code—Failure of magistrate to question accused about right—Trial, if vitiated.*

In examining the accused under the provisions of Sec. 342, Cr. P. Code in respect of offences under Secs. 147, 223, 325 & 457, I. P. C., no question in respect of a riot having been committed or in respect of the common object of that riot or in respect of the formation of an unlawful assembly had been put to any of the accused, *Held*, that there was a clear

Criminal Procedure Code (Contd.)

violation of the provisions of Sec. 342, Cr. P. Code, and the accused had been materially prejudiced in their defence on the merits by the serious omission on the part of the magistrate, and the conviction was liable to be set aside. (*Nanavutty J.*)

SHAFAT vs. EMPEROR.

1936 O. W. N. 364.

Sec. 342—Magistrate if can question accused to get an admission of facts—admission made without intimidation—value of.

The provisions in Sec. 342, Cr. P. Code do not entitle a Magistrate or a Judge to question an accused person so as to get from him an admission of facts which are not proved in the evidence. But if an accused person does in fact make such an admission, and it is clear that he has not been intimidated and that the admission was made with a full understanding of what he was saying, it may be taken into account against him in the same way as any other confession made before a magistrate. (*Mackney JJ.*)

C. T. N. R. NARAYAN CHETTYAR vs. EMPEROR,

A. I. R. 1936 Rang. 509.

Secs. 342, 423 & 428—Sessions Judge hearing appeal finding documents admitted in evidence not legally proved & therefore remanding case for further evidence—legality of the procedure.

In hearing an appeal from a conviction under Sec. 420, Penal Code, the Sessions Judge found that certain document which had been admitted in evidence by the trial Court had not been legally proved, and the examination of the accused had not been satisfactory. He thereupon sent the case back for further evidence but not for complete retrial. *Held*, that the procedure adopted by the Judge was illegal and he should have proceeded either under Sec. 423, or under Sec. 428, of the Cr. P. Code. If he proceeded under the former section he should have ordered a de novo trial. (*Rowland J.*)

KRISHNA PRASAD SINGH vs. EMPEROR.

17 P. L. T. 44.

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Secs. 342 & 537—Omission to examine accused, a fatal defect.

The defect of non compliance with the provisions of Sec. 342, Cr. P. Code, is a mere irregularity, and is cured by the provisions of Sec. 537 of the Code, unless the accused has been prejudiced thereby. (*Sulaiman C. J., & Ganganath J.*)

KUSHUM KUMARI DEBI vs. HEM NALINI DEBI,

63 Cal. 11

Secs. 342 & 537—Omission to re-examine accused, if constitutes an irregularity vitiating the trial.

The omission to re-examine an accused after the prosecution evidence is completely recorded, is not such an irregularity as vitiates the trial unless the irregularity is shown to have caused prejudice to the accused or a failure of justice. (*King C. J.*)

BECHU LAL & ORS. vs. EMPEROR.

1936 O. W. N. 480 = 1936 Cr. C. 713 =
37 Cr. L. J. 616 = A. I. R. 1936 Oudh
311 = 162 I. C. 389.

Sec. 347—Scope of—whether controlled by provisions of Chap. XVIII.

A Magistrate who under Chap. XVIII, Cr. P. Code is enquiring into a case triable by the Court of Sessions or High Court and to whom before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the Court of Sessions or High Court, is not empowered under Sec. 347, Cr. P. Code (subject to the production of defence witnesses under Sec. 212) to commit the accused for such trial without completing the examination of the rest of the prosecution witnesses, and he is bound to record the rest of the evidence for the prosecution under Sec. 208, Cr. P. Code and then commit. (*Sulaiman C. J., Harrison, Bajpai JJ.*)

EMPEROR vs. ASGHAR & ORS,

1936 A. I. J. 1321

Sec. 350 & 436 Denovo trial ordered after framing of Charge Dismissal of complaint if amounts to acquittal.

Criminal Procedure Code (Contd.)

When a Magistrate being transferred after framing of a charge, the case is put in the hands of a new Magistrate, the accused is entitled to a resummoning and re-hearing of the witnesses, but the Magistrate may order a *denovo* trial. When there is a *denovo* trial the previous charge is wiped out. If the Magistrate finds that the accused is not guilty, he shall pass an order of discharge and acquittal. (*Gruer, J.*)

TUKARAM JANBA MARAR vs. EMPEROR.

1, L. R. 1936 Nag. 92 = 19 N. L. J. 115 = 1936 Cr. C. 708 = 37 Cr. L. J. 983 = 164 I. C. 744 = A. I. R. 1936 Nag. 153

Sec. 352.—*Trial in camera*—*Right of complainant to question.*

The Magistrate conducted a trial in *camera* in the exercise of his own discretion as he was entitled to do by the proviso to Sec. 352 Cr. P. C., and no objection to this course was made at the time by the complainant. The proceedings cannot be upset on this ground unless the applicant can show that he was in fact prejudiced by the case being tried not in open Court. (*Drunkley J.*)

W.E.GARDNER vs. U. KHA.

1936 Cr. C. 961 = 165 I. C. 596 = A. I. R. 1936 Rang. 471.

Secs. 352, 326 & 260—*Magistrate not trying offence summarily*—*Record of evidence in language of Court, if necessary.*

If a magistrate does not try an offence summarily under the provisions of Sec. 160, Cr. P. Code, but tries it in the ordinary course, he is required by Sec. 355 of the Code to make a memorandum of the evidence. He is not required to record the evidence in the language of the Court or have it so recorded. The provisions of Sec. 356, Cr. P. C. apply only to cases in which the provisions of Sec. 355 are not applicable. (*Allsop J.*)

HAFIZ MOHAMMED RAFIQUE AHMED vs. EMPEROR.

1936 A. W. R. 375 = 1936 A. L. J. 274 = 1936 Cr. C. 476 = 37 Cr. L. J. 710 = 162 I. C. 758 = A. I. R. 1936 All 319

Sec. 369—*Application of the rule laid down in the section*—*power of the*

Criminal Procedure Code (Contd.)

High Court to alter sentence after pronouncing sentence.

Sec. 369, Cr. P. Code, lays down as a general rule that no Court shall alter or review its judgment after it has signed it, except to correct clerical errors. But the general rule under the section comes into operation only when the Court has signed its judgment. In the case of the High Court exercising Ordinary Original Criminal jurisdiction, no judgment nor any other pronouncement of its decision is signed until the warrant is signed by the presiding judge. The warrant is drawn up some little time after the sentence has been orally pronounced. The practice has been for the judge in proper cases to review the sentence though already pronounced in Court so long as the warrant has not been drawn up and signed. That practice does not seem to conflict with Sec. 369, but to conform with the implications in what is left unexpressed in the section. Therefore so long as the presiding judge has not signed the warrant, he retains power to alter or review the sentence passed by him. (*Tyabji J.*)

EMPEROR vs. ABDUL RAHIMAN AKRAM-DIN & ANR.

63 Bom. 485 = 38 Bom. L. R. 153 = 1936 Cr. C. 573 = 37 Cr. L. J. 753 = 162 I. C. 950 = A. I. R. 1936 Bom. 193

Sec. 369, 419, 420 & 421—*Appeal from jail dismissed summarily*—*Accused if can file another appeal though Counsel.*

When an appeal presented by a convict from jail has been summarily dismissed, it is not open to him to file another appeal though a Counsel. (*King C. J. & Nanavutty, J.*)

RAMZAN & ORS. vs. EMPEROR.

1936 O. W. N. 194 = 1936 Cr. C. 344 = 37 Cr. L. J. 362 = 160 I. C. 969 = A. I. R. 1936 Oudh 219.

Secs 369 & 261A—*High Court, if can review its judgment in a criminal review case, after it has been signed and sealed.*

Under Sec. 369, Cr. P. Code, the High Court has no power to review its judgment, after it has been signed, except to correct a clerical error. The

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provisions of Sec. 561A of the Code cannot be invoked, so as to give the High Court a general and undefined power of review. (*Kendall & Bajpai JJ.*)

EMPEROR vs. BANWARILAL.

57 All. 867.=1935 A. W. R. 327=
1935 A. L. J. 317=1935 Cr. C. 507=
36 Cr. L. J. 1286= A. I. R. 1935 All
466.=157 I. C. 1044.

Secs. 374 418 & 422—*Reference for confirmation of sentence of death passed at trial by jury and appeal by accused High Court, if bound to appeal or order retrial on finding misdirection and illegal admission of evidence if may itself decide on facts.*

In a case of reference for confirmation of a sentence of death as also appeals by the accused, the High Court, any while finding that there had been misdirection, nondirection and illegal admission of evidence, affirm the conviction without directing a retrial upon question about the veracity of witness or upon the finding of doubtful facts, but upon what inference was to be drawn from well established facts about the existence of which there is and cannot be any reasonable doubt; the High Court is as well, if not better qualified than the jury to draw the necessary inference. (*Lort Williams & Nasim Ali JJ.*)

EMPEROR vs. BENOYENDRA CHANDRA PANDEY & ANR.

63 Cal 929=40 C. W. N. 432=64 C.
L. J. 154=1936 Cr. C. 145=37 Cr. L.
J. 394=161 I. C. 74=A. I. R. 1936 Cal
73.

Sec. 374—*Test for deciding whether retrial should be ordered or the case decided on merits.*

There can be no broad proposition that in dealing with the reference under Sec. 374, Cr. P. Code. and an appeal by the accused, only two courses are open to the High Court, namely, either to acquit the accused or to order a retrial. In such a case the appeal by the accused is on facts as well, and the High Court is bound to satisfy itself by going through the evidence whether the accused has been rightly convicted, although in doing so, it must attach considerable importance to the verdict of the jury. If it appears

Criminal Procedure Code (Contd.)

to the High Court that confining itself to the evidence admissible in law and even without an opportunity of hearing witnesses and seeing their demeanour, certain facts immerge as proved beyond reasonable doubt, that the decision in the case depends upon the inference to be drawn from those proved facts, the High Court is not bound to order a retrial. When, however, the evidence cannot be properly weighed without hearing witnesses and seeing their demeanour in the witness box, and the Court is not in a position to say whether the facts from which inference are to be drawn are true or false, a retrial must be ordered. (*Lort Williams & Nasim Ali JJ.*)

EMPEROR vs. BENOYENDRA CHANDRA PANDEY & ANR.

63 Cal. 929=40 C. W. N. 432=64 C. L.
J. 154=161 I. C. 74=37 Cr. L. J. 394
=1936 Cr. C. 145=A. I. R. 1936 Cal
73

Sec. 386—*Fine, if may be realised by actual seizure of standing crops belonging to joint family of which accused is coparcener.*

In the case of a sentence of fine, Sec. 386 prescribes two modes of recovering fine of which one is by issuing a warrant to the Collector of the District authorising him to realise the amounts by execution either against the movable or immovable property or both of the defaulter. A share in standing crops being unascertained cannot be attached by actual seizure of the crops, as in that case the rights of the other coparceners are liable to be infringed. (*Venkata Subba Rao J.*)

KOLLIVENKATARATNAM vs. COLLECTOR KISTNA & ORS.

70 M. L. J. 717=43 M. L. W. 760=
1936 M. W. N. 728=1936 Cr. C. 672=
37 Cr. L. J. 836=A. I. R. 1936 Mad.
560=163 I. C. 490 (2)

Sec. 386—*Fine, if may be realised after sentence in default has been served in full.*

Except in special cases, it is both undesirable and unfair to seek to realise a fine when the sentence ordered to be served in default has been served in full. The proviso to Sec. 386 contemplates cases in which, for some sufficient reasons, the authorities

Criminal Procedure Code (Contd.)

have not been able to realise the fine before the sentence in default has been served. The reason to be recorded is such reason. That the accused is a man of dangerous character is not such reason as is contemplated by Sec. 386. 59 Bom. 350 followed, (*Lort Williams & Jack JJ.*)

JADABENDRA NATH PANJA vs. EMPEROR.

40 C.W.N. 904 = 161, I. C. 979 = 37 Cr. L. J. 524 (2) = 1936 Cr. C. 291 = A.I.R. 1936 Cal. 149.

Sec. 389—Subdivisional Officer appointed Special Magistrate under Act XII of 1932, if successor-in-office of Subdivisional officer appointed Special Magistrate under Ordinance XI of 1931.

A Sub-divisional Officer even though he may have been appointed a special magistrate under the Bengal Suppression of Terrorist Outrages Act (XIII of 1932) is not for the purposes of Sec. 389 of the Cr. P. C. the successor-in office of the previous sub-divisional officer who was appointed a special magistrate under Sec 23 Ordinance XI of 1931. (*Lort Williams & Jack JJ.*)

JADABENDRA NATH PANJA vs. EMPEROR

40 C. W.N. 604. = 161, I. , 979 = 39 Cr. L. J. 524 (2) = 1936 Cr. C. 291 = A. I. R. 1936, Cal 149.

Secs. 390 & 391—Sentence of whipping and detention in school—whipping, if may be inflicted in the school,

Where a youthful offender for one offence, is ordered to be detained in a training school or a Borstal institution, and, for another offence tried at the same trial is sentenced to whipping, the Magistrate must act under the provisions of Sec. 390 Cr. P. C. and either order the whipping to be inflicted in his own presence, or direct that it shall be inflicted at some convenient jail in the presence of the officer in charge of the jail. A Borstal institution being clearly not a jail under Sec. 391 Cr. P. C. the Superintendent of such Institution is not an officer in charge of a jail and cannot in his position as Superintendent carry out the sentence of whipping which was ordered by the Magistrate. (*Roberts C. J. Leach & Dunkley JJ.*)

EMPEROR vs. NGA PYN & ANR.

1936 Cr. C. 976 = 165 I. C. 576 = A. I. R. 1936 Raug, 485.

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Sec. 397—Separate trials—Concurrent sentence, if may be passed

Under Sec. 397; Cr. P. C. where an accused is tried for different offences in separate trials, the sentence passed in each such trial must run consecutively unless otherwise ordered. (*Skemp J.*)

TIKAYA RAM & ORS. vs. THE CROWN.

38 P. L. R. 223.

Sec. 403—Order of re-trial—Acquittal as to some of the charges—Procedure after re-trial.

A Sessions Judge ordering a re-trial of a case on appeal by accused who were convicted on some of the charges but acquitted on other charges by the Assistant Sessions Judge in agreement with verdict of the jury, cannot order a re-trial in respect of the offence in which the accused had been acquitted there being no appeal by the Crown against the order of acquittal. The re-trial should be limited to the charge or charges under which the appeal was preferred. The trial on the other charges which were the subject already of an acquittal will be excluded. 38 C.W.N.1128 followed, 39 O. W. N. 677 dissented (*Cunliffe & Henderson JJ.*)

NAIMUDDIN vs. EMPEROR.

63 C. L. J. 124 = 63 Cal 1112.

Sec. 403 (1)—Prosecution for creating an obstruction in the bed of a river—Subsequent prosecution for meddling with the embarkment of the river if barred.

The accused was first tried for creating an obstruction in the bed of the river by extending a tank and making banks which would constitute an obstruction under the section. On being acquitted he was again prosecuted with the offence of meddling with an embarkment of a river.

Held, the principle of *autrefois acquit* operated in favour of the accused, and the subsequent prosecution based on the same facts as the former was barred, (*Cunliffe & Henderson JJ.*)

SHIB CHANDRA RAY vs. EMPEROR.

1936 Cr. C. 946 = 165 I. C. 847 = A.I. R. 1936 Cal. 689.

Sec. 403—Plea of *autrefois acquit*—when may be raised.

Criminal Procedure Code (Contd)

There is no rule of practice defining the proper time for raising a plea of autrefois acquit. The rule can be invoked by an accused person at any stage of the proceedings 35 Mad. 701 referred. (*Cornish Mockett and Lakshmana Kao JJ.*)

EMPEROR vs. JOHN MC IVOR.

70 M. L. J. 535=1936 M. W. N. 281=
1936 Cr. C. 433=37 Cr. L. J. 637=A.
R. 1936 Mad. 353=162 I. C. 592 (2)

Sec. 403 (2)—*Accused tried of the offence of causing hurt in the course of an affray and also of the offence of affray—Finding of acquittal of the offence of affray if bars conviction for causing hurt.*

The offence of causing hurt in the course of an affray is an entirely distinct offence from the affray itself on the ground that the affray is committed not alone by the party causing the hurt, but by both parties namely the party causing the hurt and the party receiving the hurt. Where the two offences are connected in that manner, the matter is governed by Sec. 403 (2) Cr. P. C. which definitely provides for a second trial of the second offence. So an acquittal of the offence of affray does not bar the subsequent prosecution of the offence of causing hurt. 47 All. 284 relied; 2 P. L. T. 31 and 11 P. L. T. 722 referred, (*Dhavit J.*)

SANKATHA RAI vs. KHADERAN MIAN.

17 P. L. T. 723=1936 Cr. C. 825=37
Cr. L. J. 785=A. I. R. 1936 Pat. 503=
163 I. C. 29.

Sec. 403 (2)—*Acquittal on charge of cheating by use of false affidavit—fresh complaint for making false affidavit, if maintainable.*

Under Sec. 493 (2) Cr. P. C. Code, a person acquitted of any offence may afterwards be tried for a distinct offence for which a separate charge might have been made against him at the former trial under Sec. 235 (1), Cr. P. Code. Swearing a false affidavit, and using that false affidavit are distinct offences even though they are part of the same transactions. A person acquitted of a charge of cheating by use of a false affidavit might be subsequently tried for the offence of swearing that false affidavit. (*Mosely J.*)

ABDUL HAMID vs. EMPEROR,

Criminal Procedure Code (Contd)

14 Rang. 24=37 Cr. L. J. 492=1936
Cr. C. 271=161 I. C. 763=A. I. R. 1936
Rang. 174.

Sec. 408, Proviso (b)—*Order of detention in Borstal School, if constitutes a sentence of imprisonment.*

An order passed under Sec. 25, (1), Burma Prevention of Crime (Young Offenders Act), 1930, directing the accused to be detained in a Borstal School is not a sentence of imprisonment within the meaning of proviso (b) to Sec. 408, Cr. P. Code. (*Dunkley J.*)

NGA THA E. ANR vs. EMPEROE.

14 Rang. 143=1936 Cr. C. 513=37 Cr.
L. J. 793=163 I. C. 148=A. I. R. 1936
Rang. 329.

Sec. 408, Proviso (b)—*Appeal from order directing accused to be detained in Borstal School—Court competent to entertain the appeal.*

In respect of any order of detention in a Borstal School for any period passed by a Magistrate there is under Section 13, Burma Prevention of crime (Young Offenders Act) a right of appeal to the local Court of Session and the only circumstances in which the appeal against such an order will lie to the High Court, is when a co-accused who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding 4 years. In such a case the appeal will lie to the High Court under the provisions of proviso (b) to Sec. 408, Cr. P. Code. (*Dunkley J.*)

NGA THA E & ANR. vs. EMPEROR.

14 Rang. 143=1936 Cr. C. 513=37 Cr.
L. J. 793=163 I. C. 144=A. I. R. 1936
Rang. 229.

417—*Appeal from order of acquittal—Opinion of trial Court regarding credibility of witnesses—full weight and consideration must be given.*

When a criminal case comes up before the High Court in appeal or revision the High Court before reaching its conclusion upon fact, should always give proper weight and consideration to the views of the trial judge as to the credibility of the witnesses. 56 All. 645 relied, (*Ba U and Mackney JJ.*)

Criminal Procedure Code (Contd.)**EMPEROR vs. NGA MYA MAUNG.**

1936 Cr.C. 114 = A.I.R. 1936 Rang. 90.

Sec. 417—*Appeal against acquittal—Principles to be followed.*

The accused in an appeal from an acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him. He has the right which he had in the trial court of being given the benefit of a reasonable doubt as to his guilt. He must also have the benefit of the opinion of the trial court upon the credibility of the witnesses whom that Court had the advantage of seeing face to face and judging of their demeanour and he has the right to ask that the acquittal should not be set aside unless the trial court has taken a perverse view of the evidence and has arrived at an unnatural and distorted confession. 10 P. L. T. 838 followed. (*Varma & Rowland JJ.*)

EMPEROR vs. CHATURBHUI NARAYAN CHAUDHURY.

15 Pat. 108 = 17 P.L.T. 302 = 37 Cr.L.J. 877 = 1936 Cr. C. 543 = 164 I.C. 74 = A.I.R. 1936 Pat 350.

Secs. 417 & 439—*High Court when may interfere in revision with an order of acquittal.*

The High Court will not ordinarily interfere in revision with an order of acquittal, because, such an order is appealable under Sec. 417 unless there has been illegality in the proceedings in the Court which passed the order of acquittal or the order was made without jurisdiction. (*Mya Bu J.*)

HTANDA MEAH vs. ANAMALE CHETTIAR.

37 Cr. L. J. 832 = 1936 Cr. C. 593 = 163 I.C. 242 (2) = A.I.R. 1936 Rang. 247.

Sec. 419—*Accused if may present fresh appeal through Counsel, after jail appeal is dismissed.*

Once an appeal presented by a convict from jail is dismissed it is not open to the same prisoner to file another memorandum of appeal through a counsel. (*King C. J. & Nanavutty J.*)

RAM JAS & ORS. vs. EMPEROR.**Criminal Procedure Code (Contd.)**

1936 O.W.N. 194 = 1936 Cr. C. 314 = 37 Cr. L. J. 362 = 160 I.C. 969 = A. I. R. 1936 Oudh. 219.

Sec. 421—*Appeal, summarily dismissed—Order appealed against if may be modified, at the same time.*

It is illegal at the same time to dismiss an appeal summarily and to modify the order appealed from. (*Rowland J.*)

BALDEO SINGH vs. MT. DHENO GOALIN.

1936 Cr.C. 144 = 37 Cr. L. J. 234 = 160 I. C. 152 (1) = A.I.R. 1936 Pat. 109.

Sec. 421(1)—*Summary dismissal of appeal after calling for records and perusing same—accused or pleader, if must be heard again although once heard when presenting appeal—power of the High Court to set aside the summary dismissal.*

Before dismissing an appeal summarily after calling for the record and perusing the same, the appellate Court is not bound to bear the appellant's pleader again if he was once heard when presenting the petition of appeal. The High Court may, however, set aside an order of summary dismissal if on the fact, the case appears to be one in which the appeal ought to have been summarily dismissed. (*Lort Williams and Jack JJ.*)

MANMATHA NATH SIRCAR vs. DHATRI-GRAM UNION BOARD.

40 C. W. N. 128 = 37 Cr. L. J. 904 = 164 I. C. 270.

Sec. 422.—*Omission to issue notice—effect.*

The omission to issue notice under Sec. 423 is no doubt fatal to the proceedings before the Appellate Court. 53 Cal. 969 referred. (*Mya Ba J.*)

HTANDA MIAN ANAMALE CHETTIAR.

1936 Cr. C. 593 = 37 Cr.L.J. 832 = 163 I. C. 242 (2) = A.I.R. 1936 Rang. 247.

Secs. 422, 409 & 494—*Notice to complainant if necessary.*

In a criminal trial notice to the complainant is not necessary and he has no right of audience. In the Central Provinces it is the practice to issue notice to the complainant in certain class of cases only. Where compensation has been awarded to the complainant it is desirable

Criminal Procedure Code (Contd.)

to issue notice to him, but the failure to do so will not necessarily call for interference by the High Court. (*Bose J.*)

KARTIK RAM vs. EMPEROR.

19 N. L. J. 158.

Secs. 422 & 445.—*Notice to complainant if obligatory in appeal from conviction.—Notice when recommended.*

Although an Appellate Court cannot be said to be acting without jurisdiction in not sending notice to the complainant yet nevertheless an appellate Court should in the exercise of a proper discretion, give notice of hearing of the appeal, from a conviction, to the complainant when an order of compensation had been made in his favour under Sec. 545 Cr. P. C. (*Grille J.*)

BALWANT GANESH MARATHE vs. MOTILAL NATHURAM JAIN.

*1. L. R. 1936 Nag. 147 = 19 N. L. J. 140 = 1936 Cr. C. 694 (2) = 165 I.C. 641 = A. I. R. 1936 Nag. 144.

Sec. 423.—*Powers of the appellate court—verdict of the jury when can be interfered with,*

In dealing with an appeal from a conviction by a jury, the appellate Court by reason of sub sec. (2) of the Sec. 442 is not authorised to alter or reverse the verdict of the jury unless it is of opinion that such verdict was erroneous owing to a misdirection by the judge or to a misunderstanding on the part of the jury of the law as laid down by him. The appellate Court therefore cannot go into the facts of the case except to see whether there has been any misdirection by the judge. (*Beasley C. J. & King J.*)

RATNANAS. BHAPATHY GOUNDAN vs. THE PUBLIC PROSECUTOR.

71 M.L.J. 239 = 59 Mad. 904 = 164 I. C. 243 = 37 Cr. L. J. 909 = 1936 M.W.N. 359 = 44 M.L.W. 155 = 1936 Cr. C. 635 = A. I. R. 1936, Mad. 516.

Sec. 423.—*Accused tried under Sec. 304, I. P. C., but convicted of an offence under Sec. 325—appeal by accused—appellate Court, if can direct retrial of accused for offence under Sec. 304.*

Criminal Procedure Code (Contd.)

Where a man is tried of a more serious offence and is convicted of a less serious one he must be held to have been acquitted of the more serious offence, and the acquittal cannot be set aside except upon an appeal filed by the Local Government. Hence where an accused is tried under Sec. 304 I. P. C. but is convicted under Sec. 222 I. P. C. he must be held to have been acquitted of an offence under Sec. 304, I. P. C., and if he appeals against his conviction under Sec. 355, I. P. C., the appellate Court cannot set aside his acquittal under Sec. 304, I. P. C., and cannot direct that he should be retried merely because it disagrees with the finding of the trial court that the accused had not committed the more serious offence of culpable homicide not amounting to murder. 50 All 722 relied on. (*Alsopp J.*)

MOTI RAM vs. EMPEROR.

1936 A. W.R. 921 = 1936 A.L.J. 1055 = 1936 Cr. C. 999 = 162 I. C. 634 = A.I.R. 1936. All 758.

Sec. 423.—*Dismissal of appeal summarily and modification of order appealed from—legality of,*

It is illegal for an appellate Court to dismiss an appeal summarily and at the same time to modify the order appealed from 62 Cal. 983 relied (*Rowland J.*)

BALDEO SINGH & ANR vs. Mssr DHANO GOALIN.

160 I. C. 152. (1) = 37 Cr. L. J. 234. = 1935. Cr. C. 144 = A. I. R. 1936 Pat. 109.

Sec. 453.—*Power of Appellate Court to, change conviction from one section to another.*

The appellate court has power to alter a finding of conviction from one section to another, and this power is not lost simply because the prosecution has been launched under inappropriate section. (*Gruer J.*)

NATHU SINGH GANPAT SINGH RAJPUT vs. EMPEROR.

1936 Cr. C. 425 = A. I. R. 1936 Nag 363.

Sec. 423.—*Power of appellate Court to change conviction from one sentence to another.*

Criminal Procedure Code (Contd)

The Appellate Court can change the conviction of the accused from one section to another where the facts found are clear and no prejudice would be done to the accused. But it cannot change the conviction to a section the essential element of which was not fully considered in the trial as that might prejudice the accused. (*Crucr J.*)

VITHAL SONAJI MARATHE vs. EMPEROR.

1936 Cr. C. 1120 = A I R 1936 Nag. 275.

Secs. 423 & 403—Sessions Judge ordering retrial of case by Asst. Sessions Judge and Jury, if may direct retrial of charge of which accused acquitted.

When at a trial held by an Asst. Sessions Judge with the aid of a Jury, the accused has been convicted of certain offences but acquitted of others, the Sessions Judge cannot, on an appeal by the accused, direct his retrial, on a charge of which he was acquitted. 38 C. W. N. 1128 & 39 C. W. N. 677 followed. 40 Cal. 163 distinguished. (*Cunliffe & Henderson JJ.*)

NAIMUDDIN BISWAS & ORS. vs. EMPEROR.

63 Cal. 1112 = 40 C. W. N. 666 = 63 C. L. J. 124.

Sec. 423(1) (a)—"That the accused be retried"—not applicable to an order of acquittal.

The words "that the accused be retried" in Sec. 423 (1) (a) do not apply to a case where the order of acquittal is passed on appeal. (*Parker J.*)

EMPEROR vs. U. KADDE.

1936 Cr. C. 671 = 37 Cr. L. J. 1008 = 163 I. C. 769 = A. I. R. 1936 Rang. 369

Sec. 423(b) (1)—Appellate Court if may enhance sentence of fine by reducing imprisonment—fine if may be increased beyond the power of the convicting Magistrate.

It is objectionable for the Appellate Court to enhance the sentence of fine, when there is no appeal by the Crown, or to enhance a sentence beyond the power of the convicting Magistrate. (*Skemp J.*)

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ABDUL RAHMAN & ORS. EMPEROR.

38 P. L. R. 247 = 1936 Cr. C. 793 = 37 Cr. L. J. 950 = 164 I. C. 462 = A. I. R. 1936 Lah. 729.

Sec. 426—Youth convicted of attempting to shoot a man if can be released on bail pending disposal of the appeal.

A person who has been convicted of the offence of deliberately attempting to shoot a man with a revolver cannot, on preferring an appeal from the order of conviction, be released on bail pending the disposal of the appeal, unless he can show that his conviction was not justifiable. The fact that he is only 19 years of age and that it will be unfortunate for him to be associated with bad characters in jail, if ultimately it is found that he was not guilty, is no ground for allowing his application for bail. (*Allsop J.*)

DHANPAL vs. EMPEROR.

1936 A. W. R. 733. = 164 I. C. 783(2) 37 Cr. L. J. 1017 = 1936 A. L. J. 961. = 1936 Cr. C. 792 = A. I. R. 1936 All 656.

Secs. 435 & 439—Question whether the object of the criminal act was acquisition of property or interference with another person's enjoyment, if may be gone into by the High Court in revision.

The question whether the principle object of the criminal act is the acquisition of property or the interference with another person's enjoyment is primarily a question of fact for the courts below, and ordinarily would not be taken up in revision if the Courts below have recorded any finding that the acts proved and the intention with which they were done constituted the offence of theft. (*Rowland J.*)

BALDE. NARAIN CHAUDHURY vs. EMPEROR.

16 P. L. T. 891

Sec. 426—Further enquiry directed on ground of non-examination of certain witnesses—order refusing to summon such witnesses as Court witnesses and directing complainant to pay costs, if he wanted their evidence if proper.

Where a complaint alleging grave offences had been dismissed by the Magistrate under Sec. 203, Cr. P. Code, but the Ses-

Criminal Procedure Code (Contd.)

sions Judge directed a further enquiry in the matter and observed that certain witnesses should be examined, but the Magistrate refused to summon the witnesses as court witnesses and observed that the witnesses could be summoned only on deposit of the necessary costs, *held*, that the order was improper, and in the circumstances of the case, all persons whose evidence might throw any light on the matter should have been examined, regardless of any payment of costs by the complainant. (*Patterson & Cunliffe JJ.*)

SURENDRA NATH DEY *vs.* KRISHNA DHAN DEY.

40 C. W. N. 1251.

Sec. 436—*Framing of charge on the minor instead, of the major section if amounts to discharge of major offence.*

Where a magistrate deliberately frames a charge on a minor section instead of on the major section on which the case starts, his action is equivalent to a discharge with regard to the major offence. In such circumstances the Sessions Court has power to order a further enquiry under Sec. 426, Cr. P. C. 20 Cal. 633 & 28 Mad. 225 not followed; 24 Mad. 136, 42 All 128 & 50 All. 722 relied on. (*Gruer J.*)

GANGA DATTA *vs.* EMPEROR.

I. L. R. 1936 Nag 54 = 162 I. C. 925 = 37 Cr. L. J. 715 (2) = 1936 Cr. C. 552 = A. I. R. 1936 Nag 87.

Sec. 438—*Order directing a minor girl to be handed over to her husband—District Magistrate, if can set aside the order.*

The District Magistrate's powers under Sec. 438, Cr. P. Code, refer to sentences imposed against the applicant before him. Where the revision before the District Magistrate is against an order directing that a certain minor girl be produced in Court and handed over to her husband, the District Magistrate has no jurisdiction to set aside the order. (*Thom J.*)

MOTI *vs.* BENI-

1936 A. W. R. 820 = 1936 A. L. J. 1097 = 1936 Cr. C. 1111 = A. I. R. 1936 All 852.

Sec. 439—*Acquittal if may be inter-*

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ferred with in revision merely on ground of wrong application of law on facts found.

The High Court cannot interfere with an acquittal in revision merely on the ground that on the facts found the law was wrongly applied, because the facts may as well have been wrongly found. The High Court must be satisfied that the acquittal is wrong altogether, apart from the reasons given by the trial Magistrate. (*Cunliffe & Henderson JJ.*)

ROSHAN LAL KHETTRY *vs.* S. Z. AHMED.

40 C. W. N. 931 = 164 I. C. 996, = 37 Cr. L. J. 1081.

Secs. 438 & 439—*High Court when will interfere in revision against an order of acquittal.*

The High Court will not readily reverse an order of acquittal made in favour of any party unless it appears to it that there has been a very grave miscarriage of justice and the aggrieved party had no other remedy but to move the High Court in revision to set aside such a perverse order of acquittal. Where, therefore the judgment of the trying magistrate is neither perverse nor manifestly unjust, it is not open to revision by the High Court. (*Nanavutty J.*)

MAULA BAKSH *vs.* RIAZ AHMED & ANR.

1936 O. W. N. 381 = 161 I. C. 828 = 37 Cr. L. J. 490

Sec. 439—*Death of applicant after making application for revision—Effect.*

Where in a criminal revision the applicant died after making the application, *held*, that as a case can be brought to the notice of the High Court by any person, and as the High Court will thereafter take action *suo motu* if the record indicates that there is sufficient reason to do so, it does not matter whether the applicant is dead or not. (*Allsop J.*)

FARIDUDDIN KHAN *vs.* EMPEROR.

1936 A. W. R. 273 = 1936 A. L. J. 253 = A. I. R. 1936 All. 313 = 152 I. C. 388 = 37 Cr. L. J. 565 (1) = 1936 Cr. C. 476.

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Sec. 439.—*Conviction based on tainted evidence of accomplice—High Court, if will interfere in revision.*

It is not usual for the High Court to interfere in revision with a decision of the lower Court when that decision is based upon a consideration of the evidence on the record, but when the evidence is that of accomplices, and the lower appellate Court has not given weight to this factor and has upheld the conviction by the lower Court upon the tainted evidence of accomplices, the conviction cannot be upheld by the High Court in revision. (*Nanavutty J.*)

JAGADISH PRASAD *vs.* EMPEROR.

1935 O. W. N. 829 = 164 I. C. 428, (2)
= 37 Cr. L. J. 951 = 1936 Cr. C. 1083 =
A. I. R. 1936 Oudh 401.

Sec. 439.—*Limitation for application in revision.*

The practice prevailing in the Patna High Court is not to entertain applications in revision not presented within sixty days of the order applied against. There is no reason to depart from this usual practice, where there is nothing of special importance to justify such departure. (*Rowland J.*)

BALDEO SINGH *vs.* M.SST. DHENO GOVLIN

160 I. C. 152 (1) = 37 Cr. L. J. 234 = 1936 Cr. C. 144 = A. I. R. 1936 Pat 109.

Sec. 439.—*Accused deprived of protection and privilege of substantial nature.—Proceeding liable to be quashed in revision.*

Ordinarily any attempt to deprive the accused of the protection and privileges of a substantial nature which the law confers on him must result in a quashing of the proceedings. (*Bose J.*)

VISWANATH PANDURANG KUMBI *vs.* EMPEROR.

1936 Cr. C. 1040 = A. I. R. 1936 Nag. 249

Sec. 439.—*Accused, if may be acquitted in revision proceedings for enhancement of sentence.*

The High Court may when hearing a reference from the District Judge for the enhancement of the sentence passed on the

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accused direct the acquittal of the accused if the case against him appears to be doubtful. (*Abdul Rashid J.*)

RAJINDRA NATH *vs.* THE CROWN.

38 P. L. R. 228

Secs. 439 & 528 (5).—*Order transferring case without notice to other side—liable to be set aside in revision.*

An order by a District Magistrate transferring a case without giving any reason, and without notice to the other side is liable to be set aside in revision (*Gruer J.*)

CHOTEMIYA *vs.* ASRAF MIYA.

I. L. R. 1936 Nag. 87 = 1936 Cr. C. 705
= 37 Cr. L. J. 1006 = 164 I. C. 629 = A.
I. R. 1936 Nag. 181

Secs. 439 & 253.—*Witnesses cited by complainant before prosecution had begun, not summoned—effect.*

It is a grave error on the part of a Magistrate to refuse to summon any witnesses whom the complainant has cited before the evidence for the prosecution has begun, and the order for discharging the accused is liable to be therefore set aside. (*Grille J.*)

SETH THAKURDAS *vs.* NARAYN.

I. L. R. 1936 Nag. 205 = 1936 Cr. C. 815
= A. I. R. 1936 Nag 192.

Secs 439 & 526 (3).—*Right of accused to be heard in revision—Transfer of appeal pending in lower Court to High Court if prejudices accused.*

Under Sec. 526 (3) the High Court can transfer any appeal pending in a lower court to itself for trial, provided it is expedient for the ends of justice for it to do so, and in that case the accused would be deprived of what he calls his right of revision. As a matter of fact the accused has no such right. Interference in revision is purely discretionary; it is not even necessary to hear the accused. The fact that he is invariably heard and the fact that the discretion conferred by Sec. 439 is exercised in a judicial manner, does not make any difference to the fact that the accused has no right to any of these things. All that he is entitled to is that a second court of competent jurisdiction should hear his entire case as an appeal. If he gets that, he has obtained

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all that the law allows him and when the High court hears his appeal in place of a lower court, he has obtained a good deal more than he had any right to claim. (*Vivian Bose J.*)

BAPURAO vs. EMPEROR.

1935 Cr. C. 715 = A. I. R. 1936 Nag 160

Sec. 439 (6)—*Appeal from a conviction in trial by jury—application by (for) for enhancement of sentence—court, if can go into facts.*

Sec. 439 (6), Cr. P. Code cannot override the express and imperative provisions of Sec. 123. A convicted person in showing cause against his conviction under Sec. 439 (6) of the Code has only the same right as he has when he comes before the court by way of an appeal under Sec. 423. An appellate Court is therefore not entitled to go into facts of the case and reverse the finding of the jury by reason of fact that the Crown has applied under Sec. 439 for the enhancement of the sentence passed by the trial Court (*Beasley C. J. & King J.*)

RATNASABAPATHY vs. THE PUBLIC PROSECUTOR MADRAS.

59 Mad 904 = 71 M. L. J. 231 = 164 I. C. 243 = 37 Cr. L. J. 909 = 1935 M. W. N. 459 = 44 L. W. 155 = 1936, C. C. 635 = A. I. R. 1936 Mad 516.

Sec. 439(6) & 423(2)—*Right of accused to show cause against conviction when rule issued to show cause for enhancement of sentence—Verdict of jury if may be questioned.*

Sec. 439 (6) Cr. P. C. entitles the person who has been called upon to show cause why his sentence should not be enhanced to show cause against his conviction, so far as Sec 423 (2) allows. The combined effect of Sec., 439 (6) and 423 (2) is to entitle the accused to question the conviction by showing that the judge misdirected the jury or that the jury misunderstood the law as laid down by the Judge in his charge. The accused is not entitled to question the propriety of the verdict of the jury. (*Niamatullah & Ganga Nath JJ.*)

EMPEROR vs. BISWANATH.

A. I. R. 1936 All. 850

Sec. 449—*Power of High Court under the section.*

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The terminology of Sec. 449, Cr. P. Code is so clear and definite that there is hardly any room for entertaining any uncertainty about the plenary powers of the High Court. It cannot with due conformance to the law refuse to entertain an appeal on a matter of fact notwithstanding that the jury's verdict is unanimous and concurred in by the Judge. Nevertheless, the powers unrestricted as they are, must be exercised in accordance with the well recognised principles governing appeals in general. (*Grille J. C. & Niyori A. J. C.*)

JAMES DOWDALL vs. EMPEROR.

31 N. L. R. (Suppl.) 215 = A. I. R. 1936 Nag. 103 = 162 I. C. 430 = 37 Cr. L. J. 607 = 1936 Cr. C. 605.

Sec. 473—*Certificate of visitor of lunatic asylum—if requires to be formally proved.*

A certificate signed by the visitors of a lunatic asylum, and its superintendent, in the prescribed form is a public document, and is not required to be proved in view of Sec. 473 Cr. P. C. (*Lort-Williams & Jack JJ.*)

KALIDAS SARKER vs. EMPEROR.

63 Cal 425

Sec. 476—*Complaint under, against certain persons—Magistrate, if debarred from proceeding against others against whom complaint not made or refused to be made—Complaint, if need be against specified persons.*

A complaint made under Section 476, Cr. P. C. need not be against any specified individual or individuals; and even when the complaint names certain persons as the accused, the Magistrate enquiring into the same is not debarred from taking action against other persons whom the evidence may disclose to be concerned in the matter, even though the Court making the complaint may have refused to make a complaint against them, on being moved to do so. 21 C. W. N. 950 followed; 23 Cal. 332 dissented from. (*Lort-Williams & Jack JJ.*)

NITAI CHARAN GHOSH vs. KSHETRA-NATH GANGULY.

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63 Cal. 819 = 40 C.W.N 573 = 1936 Cr. C. 289 = 37 Cr. L. J. 221 = 162 I. C. 102 = A. I. R. 1936 Cal. 142.

Sec. 476—Order for prosecution under the section, if may be set aside on purely technical grounds.

In the case of an order for prosecution under Sec. 476, Cr. P. Code the absence of a finding by the lower court that it is inexpedient in the interest of justice that an enquiry should be made is not itself fatal to the proceedings. An order to prosecute should not be set aside on purely technical grounds if it appears on the facts that the Court below had come to a finding as to the desirability of a prosecution and the only defect was omission to use the exact words of the section. (*Rowland J.*)

NAWALAL JHA vs. EMPEROR.

159 I. C. 117 = 37 Cr. L. J. 193 = 1936 Cr. C. 254 = A. I. R. 1936 Pat. 162.

Sec. 476—Complaint under Sec. 476—*who is competent to make.*

The power to make a complaint under Sec. 476 Cr. P. C. is not among the powers specified in Secs. 3 & 4 Cr. P. C. and is not a Magisterial power, for it can be exercised as well by Civil or Revenue Courts as by Criminal Courts. (*Dhale J.*)

JOGESWAR SINGH vs. EMPEROR.

15 Pat. 26 = 17 P.L.T. 234 = 1936 Cr. C. 539 = 37 Cr. L. J. 893 = 164 I.C. 86 = A. I. R. 1936 Pat. 346

Sec. 476—Preliminary enquiry if must be made—notice if required to be given to the accused.

Although it is desirable that notice should be given to the accused before taking action under Sec. 476, Cr. P. Code, in order to give the accused an opportunity to offer any explanation which he might be in a position to give, yet there is nothing in the provisions of that section making it obligatory on the Court to issue notice. Sec. 476, however makes provision for a preliminary enquiry, but the making of the inquiry or the extent of it has been left entirely to the discretion of the Court. Nor does it appear essential that the preliminary enquiry if any, must be made in

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the presence of the accused or after giving notice to him. (*Srivastava J.*)

SAJJAD HUSSAIN vs. EMPEROR.

10 Luck 503

Sec. 476—Sanction to prosecute for offences under Secs. 209, 467 & 471, Penal Code—necessity for holding preliminary enquiry.

A complaint under Sec. 476, Cr. P. Code in respect of offences under Secs. 209 476 & 471, Penal Code, should not be made by a Court, before the matter has been thoroughly sifted by it in the course of a regular judicial enquiry. (*Nanavally J.*)

GAURI vs. EMPEROR.

1936 O. W. N. 268 = 160 I. C. 662 = 37 Cr. L. J. 518

Sec. 476 & 476B—Complaint under Sec. 476 by trying magistrate—appeal to whom lies.

An appeal lies to the Sessions Judge under Sec. 476B, Cr. P. Code, when a complaint has been filed and prosecution has been ordered by the trying magistrate under Sec. 476, Cr. P. Code. 11 Lah. 55 & 52 All. 79 followed. (*Agha Ruidar J.*)

JODPA vs. THE CROWN.

38 P. L. R. 16 = 164 I.C. 1057 = 37 Cr. L. J. 1.C. 43 = 1936 Cr. C. 796 = A. I. R. 1936 Lah. 828.

Secs. 476 & 476B—Complaint against which no appeal has been preferred if can be challenged before the Magistrate.

When a Court has made a complaint under Sec. 476, Cr. P. Code, the party aggrieved may file an appeal. Where no such appeal has been preferred, it is not open to the party to challenge the complaint itself before the Magistrate. (*Parker. J.*)

EMPEROR vs. U. KADOM.

A. I. R. 1936 Rang. 369 = 163 I.C. 769 = 37 Cr. L. J. 1008 = 1936 Cr. C. 771

Secs. 476, 476B & 165—Subordinate Judge directing complaint in proceedings arising out of suit valued at above Rs. 5,000—appeal against order directing complaint, where should be filed.

Criminal Procedure Code (Contd.)

An order passed by a subordinate judge under Sec. 476 Cr. P. Code directing the presentation of a complaint against a person passed in a proceeding arising out of a suit valued at over Rs. 5,000, is, by virtue of Section 195(3) appealable to the District Judge, and not to the High Court. (*Rowland J.*)

THAKUR PROSHAD vs. EMPEROR.

17 P. L. T. 66 = 161 I. C. 20 = 37 Cr. L. J. 313 = 1937 Cr. C. 159 = A. I. R. 1936 Pat. 122.

Sec. 479A—Power of Deputy Commissioner to direct complaint being made in respect of offence in Tahsildar's Court.

The Court of the Tahsildar dealing with mutation cases being subordinate to the Court of the Deputy Commissioner the Deputy Commissioner in the exercise of his powers as a superior Court under Sec. 476 A has authority to direct a complaint being made in respect of an offence committed in the course of mutation proceedings in the Court of the Tahsildar. (*Srivastava J.*)

SAJJAD HUSSAIN vs. EMPEROR.

10 Luck 503

Sec. 476B—Appeal to District Judge against complaint by Munsiff—subordinate Judge if competent to deal with such appeal.

The Court of the District Judge being the Court to which the Court of the munsiff is subordinate within the meaning of Sec. 195 (3) of the Cr. P. Code, an appeal from a complaint made by a munsiff under Sec. 476 of the Code, can be heard by the District Judge only, and cannot be disposed of by a Subordinate Judge. (*Rajpi J.*)

MEHADI HASAN vs. EMPEROR.

57 All. 687

Sec. 477 & 471 —Complaint by Civil Court under Sec. 476—District Court Magistrate returning complaint—Civil if can subsequently pass commitment order under Sec. 478.

The Cr. P. Code does not bar a Court from altering or reviewing its complaint under Sec. 475, Cr. P. Code. Accordingly where a Small Cause Court Judge makes

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a complaint under Sec. 476, Cr. P. Code to a first class Magistrate and on the suggestion of the Magistrate the District Magistrate returns the complaint to the Small Cause Court Judge and asks him to make a commitment to Munsiff under Sec. 478, Cr. P. Code, it is open to the Small Cause Court Judge, when the record is sent back to him by the District Magistrate to pass an order of commitment under Sec. 478, Cr. P. Code after making a fresh enquiry. (*Bennett J.*)

JAGATRAM & ANR vs. EMPEROR.

1936 A.W. R 1125 = 1936 A.L.J. 1199

Sec. 476—Application for prosecution under Sec. 476 should not be allowed unless there is reasonable probability of conviction

The terms of Sec. 476 Cr. P. C. indicate that the desirability of prosecuting the offender should be present in the mind of the Court during the proceedings in the course of which the offence was committed or brought to its notice, and prosecution should not be allowed unless there is a reasonable probability of conviction 34 Cal. 551 & 37 Cal. 250 relied (*Dunkley J.*)

U. P. THEIN vs. BUTA KHAN.

1936 Cr. C. 963 = A. I. R. 1936 Rang. 473.

Sec. 476—Application by plaintiff for Sanction to prosecute defendant for perjury—Application not pressed after plaintiff's death by his legal representatives—Court if may proceed with application.

After putting in a petition under Sec. 476 the plaintiff died, and his sons did not desire to take any part in prosecution of the application.

Held, the death of the plaintiff made no difference at all. The Court once having been moved, it was a question for the court to decide and not the parties themselves. (*Beasley C. J.*)

VENKATARAMA REDDI vs. SRINIVAS REDDI & ANOTHER.

1936 M. W. N. 991 = 1936 Cr. C. 358 = 37 Cr. L. J. 557 = 162 I. C. 285 = A. I. R. 1936 Mad. 350.

Sec. 476A Complaint under Sec. 476 Cr. P. C. by trial Court—Appellate Court,

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if may withdraw prosecution, Additional Sessions Jddge if may exercise functions of Appellate Court.

An appellate court has jurisdiction to direct withdrawal of complaint if it is not satisfied with the case for the prosecution. The power can be exercised by an Additional District Judge in the same way as a District Judge. (James J.)

DEYAS NARAIN SINGH vs. DASRATH SINGH.

17 P. L. T. 276=37 Cr. L. J. 838=
1936 Cr. C. 581=163 I. C. 451=A. I.
R. 1936 Pat. 392

Sec. 482 *Order under the section, if must be made on the date on which offence occurs.*

Under Sec. 482 Cr.P.Code, the Court does not dispose of the offence but it merely makes a complaint. It is not necessary that an order under the section should be passed on the day on which the offence occurs. (Bennet L.)

HALKHAN SINGH vs. EMPEROR.

1936 A. W. R. 879=1936 A. L. J. 1356
=165 I. C. 698=1936 Cr. C. 1003=A.
I. R. 1936 All. 762.

Sec. 488. (1) *Order fixing amount of maintenance to take effect immediately Restrictive conditions not allowed.*

A Magistrate acting under Sec. 488 Cr. P. C. is entitled only to fix the amount of maintenance to take effect immediately without any conditions. (Grier J.)

P. E. COELHU. vs. COELHU

1936 Cr. C. 913=A. I. R. 1936 Nag.
268.

Sec. 488 (5) *Living in adultery' meaning of*

The words 'living' in adultery do not indicate one or two lapse from virtue but denote a continuous conduct of immorality with a man with whom she is committing adultery. (Dunkley J.)

MA MIYAKHAN vs. GODENHO

1936 Cr. C. 864=165 I. C. 235=A. I. R.
1936 Rang. 446.

Sec. 488 & 531.—*Order of maintenance passes by Magistrate without jurisdiction—effect.*

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A Magistrate passing an order for payment of maintenance by a person residing outside the territorial limits of his district is enforceable, by virtue of the provisions of Sec. 53 Cr. P. C., unless there has been a miscarriage of justice. (Skemp J.)

BALWANT SINGH vs. MT. PARBOLI,

38 P. L. R. 963.

Sec. 491 *Proceeding under section, if competent where person lawfully committed and imprisoned by a competent Court of law,*

Where a person has been convicted according to law and sentenced to imprisonment by a court of competent jurisdiction, it cannot be said that the person has been "illegally or improperly detained" within the meaning of Sec. 491, Cr. P. Code and the High Court cannot interfere under that section. (Stone C. J. & Nyogi J.)

DIWAN SINGH vs. EMPEROR.

I. L. R. 1936 Nag. 99=19 N. L. J. 84=
1936 Cr. C. 663=A. I. R. 1936 Nag.
132.

Sec. 494. *Technical difficulty in joint trial of accused—Court should not acquit an accused but should order separate trial,*

If there is any risk of misjoinder of charges by two accused being tried together then their separate trials should be ordered. It is wrong to acquit an accused against whom a *prima facie* case had been made out by the prosecution evidence merely to avoid the technical difficulty (Robert's C. J. & Dunkley J.)

NGA FO HTEVE vs. EMPEROR.

1933 Cr. C. 969=A. I. R. 1936 Rang.
474.

Sec. 494 (a) *Person discharged under the section if may be put back on trial or put back in same proceedings.*

Per Derbyshire, C. J. Panckridge H. C. Ghose & Bartley JJ. A person discharged under Sec. 494 (a) Cr. P. Code, cannot be put back into the proceedings to be tried along with the other co accused, but may be tried, if he is to be tried in other proceedings on the same charge.

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Per Mukherjee J. The withdrawal of prosecution under Sec. 494 (a), Cr. P. Code, is intended to be unconditional, and revival of the proceeding against the person concerned in the view that his evidence has not been satisfactory, would be most improper & unseemly, although such course is not forbidden by any express provision in the statute.

HARIHAR SINGH vs. EMPEROR.

40 C. W. N. 876 163 I. C. 9=37 Cr. L. J. 758=63 C. L. J. 367=1336 Cr. C. 583=A. I. R. 1936 Cal. 356 (F. B.)

Sec. 497 (5)—*Accused released on bail trying to influence witness and to destroy evidence against him—accused, if can be re-arrested.*

The granting of bail in a non-bailable offence is a concession allowed to an accused person, and it presupposes that this privilege is not to be abused in any manner, and that the accused person has not to come into contact with the prosecution witnesses or to exert any undue influence on them so as to destroy the evidence or to minimise its effect against him. It is a sort of trust reposed in him by the Court, and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by the Court it disentitles him to the privilege so granted. This is more specially so, when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own act. (*Din Mohammed J.*)

EMPEROR vs. JIVAN LAL GAURE.

17 Lah. 779=A. I. R. 1936 Lah. 730. =164 I. C. 376=37 Cr. L. J. 937=1936 Cr. C. 765=

Sec. 499—*Bail bond—time and place at which the accused as to appear must be mentioned—omission to state so makes the bond void.*

Bail proceedings are special proceedings about which there are specific directions in the Code and they must be strictly followed. The time and place at which the accused is to appear must be mentioned in the bond and if the accused is to appear in some other Court, the bond must expressly say so. Where the bond is executed in a printed form, in which the blank spaces regard-

Criminal Procedure Code (Contd.)

ing time and place where the accused is to appear is not filled up, it cannot be enforced, for its vagueness. What the surety thought or did not think is immaterial, for the terms of a surety bond have to be determined by the language used in the bond itself. It is not for a surety to show that the bond is illegal, but for the Crown to show that the document it wishes to enforce is one which can be enforced under the law. 30 Cal. 107 (1) and 2 Rang. 581 (2) relied on. (*Bose J.*)

EMPEROR vs. CHINTARAM.

A. I. R. 1936 Nag. 243=1936 Cr. C. 1037=164 I. C. 825

Sec. 509—*Conviction of accused in the absence of medical evidence regarding cause of death, if sustainable.*

It is an elementary rule that except by a plea of guilty, admissions dispensing with proof as distinguished from admissions which are evidential, are not permitted in a criminal trial. Therefore no consent or admission by the prisoner's advocate to dispense with the medical witness can relieve the prosecution of proving by the evidence the nature of the injuries received by the deceased and that the injuries were the cause of death. (*Cornish & K. S. Menon JJ.*)

RANGAPPA & ORS. GOUNDAN, & ANR IN RE.

59 Mad. 349=70 M. L. J. 447=161 I. C. 667=37 Cr. L. J. 471=1936 M. W. N. 110=43 M. L. W. 305=1936 Cr. C. 509=A. I. R. 1936 Mad 426

Secs. 516 & 517—*Magistrate if can order Bank of accused, charge of cheating or criminal breach of trust to stop payment or direct accused not to operate an account—"Stop order" illegality of*

A Magistrate has no jurisdiction to order the Bankers of an accused who is charged with cheating or criminal breach of trust, to stop payment or to make an order on the accused directing him not to operate on his account, particularly when there is nothing to show that the money in the Bank is part of the proceeds of the offence. (*Lort Williams & Jack JJ.*)

MAKHAN LAL CHATTEJEE vs. THE EMPEROR

40 C. W. N. 96=37 Cr. L. J. 935 (1) =164 I. C. 377.

Criminal Procedure Code (Contd)

Secs. 517 & 520—Property, when no offence in respect of same proved and accused acquitted, if must be restored to person from whom taken or may be ordered to remain in trial court in case of conflicting claims, pending decision of Civil Court.

Under Sec. 517 of the Cr. P. Code, a Magistrate or the Court passing an order under Sec. 520, is not bound, in every case in which no offence is proved to have been committed in respect of property and the accused is acquitted, to restore the property to the person from whom it was last taken. When there are conflicting claims to the property, it may properly be ordered to remain in the custody of the trial Court, pending decisions by a civil court of competent jurisdiction. 28 C. W. N. 1094 followed. (*Guha & Bartly JJ.*)

RAMPHL TATWA vs. JASODIA MALAIN.

40 C. W. N. 861.

Secs 517 & 520—Additional Sessions Judge, if may refuse order by Deputy Magistrate under Sec. 517 in a case of acquittal.

An order under Sec. 517 made by a Deputy Magistrate in a case in which the accused is acquitted may be revised under Sec. 520 by an additional Sessions Judge. (*Guha & Bartly JJ.*)

RAMPHAL TATWA vs. JASODIA MALAIN.

40 C. W. N. 862

Secs. 217 & 523—Powers of the Court under the section.

The object of Sec. 517 & 522 Cr. P. Code, is to provide a summary method for restoring property which has been recently stolen or otherwise dishonestly acquired to its lawful owner. When however there is no definite charge against the person found to be in possession of the property, it is not open to the criminal courts, to enter into roving enquiry as to the rights of possession of different claimants. Such right can only be enquired into by the civil Courts. (*Bose J.*)

RANI SONA BAHU vs. SOBHAG SINGH.

19 N. L. J. 264.

Criminal Procedure Code (Contd)

Sec. 520—Order of acquittal by magistrate together with order under Sec. 517—Sessions Judge, if may deal with latter order.

The words "Court of appeal" in Sec. 520 Cr. P. Code are not limited to the Court before which an appeal may lie or may be pending in the particular case, but it applies to the court to which an appeal would ordinarily lie from the Court which made the order. Secondly, when a Magistrate passes an order of acquittal and makes an order under Sec. 517, Cr. P. Code, the Sessions Judge has jurisdiction to deal with and set aside that order under Sec. 520, although no appeal lies to him from the order of acquittal. 3 Cal. 379; 7 Rang. 345 & 56 Bom. followed. (*Guha & Bartly JJ.*)

BANURDDIN BISWAS vs. GANI MIA SAUDAGAR.

40 C. W. N. 287=160 I. C. 591=37 Cr. L. J. 313=1936 Cr. C. 112=A. I. R. 1936 Cal 21

Sec. 523—Property seized by police—Persons from whom property seized not shown to have committed offence—Some other person claiming property—Duty of the magistrate.

Under Sec. 523 Cr. P. Code, what the Magistrate has to consider is, who is entitled to possession of property which has been seized by the Police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider the question of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to the property, then the Magistrate can only hold that, that person is entitled to possession of the property. Any other person claiming the property must seek his remedy in a Civil court, and the burden will be upon him to prove his title 56 Mad. 654 & 54 Cal. 283 relied on (*Beaumont C. J. & Macklin. J.*)

LAKSHMI CHAND RAJMAL vs. GOPI KISAN BALMUKUND.

60 Bom. 183=38 Bom. L. R. 117,=162 I. C. 265=37 Cr. L. J. 573=1936 Cr. C. 363=A. I. R. 1936 Bom 171.

Criminal Procedure Code (Contd.)

Sec. 523(1)—*Confiscation, should not be ordered on mere suspicion.*

The Court should be slow in passing an order for forfeiture in cases of mere suspicion, under Sec. 523 Cr. P. C. (*Gruer J*)

SYED MAHBUB vs. EMPEROR.

19 N. L. J. 244 = 1936 = Cr. C. 1139 A. I. R. 1936. Nag. 266.

Sec. 526(1)(a)—*Application for transfer on the ground of apprehension that accused would not get fair trial—Facts to be consider by the High Court.*

When an accused applied under 526, Cr. P. C. for transfer of his case on the ground of his apprehension of his not getting a fair trial in the Court of the trying magistrate, the High Court before taking action under the Section must be satisfied that the apprehension in the mind of the accused is not a fanciful one. (*Mackney J.*)

KO KO GYI vs. EMPEROR.

A. I. R. 1936 Rang. 114 = 161 I. C. 210 = 1936 Cr. C. 181 = 37 Cr. L. J. 436

Sec. 526(1)(a)—*Hostile atmosphere prevailing in the District—accused, if entitled to a transfer of his case.*

Where the atmosphere of the place where the accused is put up for trial is charged with opposing currents and cross currents, and incidents have happened which are calculated to create in the minds of the accused a reasonable apprehension that he would not have an impartial trial in the district, it is proper in the interests of justice to transfer the case to some other district. (*Nanavutty J.*)

ALI RAZA BEGG & ORS. vs. EMPEROR.

1936 O. W. N. 354, = 160 I. C. 695, = 37 Cr. L. J. 386.

Sec. 526(1)(a)—*No suggestion of partiality of Magistrate—transfer if can be claimed on the ground that Magistrate was unduly anxious to finish case.*

When it is not suggested that the Magistrate is not quite impartial or that he is prejudiced in any way about the merits of the case, the mere fact that he said to the complainant that he was determined that the case should be finished in some way or

Criminal Procedure Code (Contd.)

other either by dismissing it for default or discharging accused or any other way, is no ground for transfer. (*Allsop J.*)

MST KAMINI BEGAM vs. BASHRI-UL-ZAMAN KHAN & ORS.

1936 A. W. R. 138, = 1936 A. L. J. 975 = 165 I. C. 20 = 37 Cr. L. J. 1100 = 1936 Cr. C. 891 = A. I. R. 1936, All 695.

Sec. 526(1)(a)—*Accused, if can apply for transfer on the ground of his being committed by the Sessions Court for contempt of Court.*

The mere fact that in the course of a trial in a Sessions Case, an accused is committed of contempt of court by the Judge, is no ground for the transfer of the Sessions Case from his court. (*Iqbal Ahmad J.*)

SALIG RAM vs. EMPEROR.

1936 A. W. R. 967

Sec. 526(1)(b)—*Mistake of law by trial Court, if a ground for transfer.*

A mere mistake of law committed by a court during the trial of a case is no ground for the transfer of a case unless it is made to appear that the court with a view to prejudice the party applying for transfer passed an illegal order. (*Iqbal Ahmad J.*)

SALIG RAM vs. EMPEROR.

1936 A. W. R. 967.

Sec. 526(1)(d)—*Transfer of case after entire prosecution evidence had been recorded, if proper.*

Where almost the entire prosecution evidence has been recorded, it is not proper for the Magistrate to transfer the case from his Court to another Court on the ground that the Magistrate is rather busy. (*Abdul Raschid J.*)

BAIJ NATH vs. RAM SARUP.

A. I. R. 1936 Lah 827, = 1936 Cr. C. 795.

Sec. 526(8)—*Proceedings in trial Court, if must be stayed on High Court admitting application for transfer.*

When on an application for the transfer of a case is admitted by the High Court, an order for stay of proceedings in the trial Court, even if not expressly made, is implied, and the trying magistrate ought to

Criminal Procedure Code (Contd)

stay the case as soon as he is informed that the application for transfer has been admitted by the High Court. (*Mohammad Noor J.*)

ISHAR SINGH vs. SHAMA DUSHADH.

17 P. L. T. 627.

Sec. 526(8)—*Magistrate proceeding with trial, when application made for stay to obtain transfer from High Court—Such hasty proceeding in itself asufficient ground for transfer—Costs for de-novo trial.*

Sec. 526 (8) enjoins that the Magistrate shall give a reasonable adjournment for the express purpose of affording an applicant an opportunity to obtain a stay order from the High Court, and the refusal to adjourn proceedings is therefore deliberate. A Magistrate refusing to do so gives the accused person reasonable ground for apprehension that he will not be prejudiced in the conduct of the trial, and such hasty action in itself will be a sufficient ground for transfer. The costs of a de-novo trial should not be given to the complainant, but should be borne by the crown. (*Grille J.*)

BALIRAM KASHINATH vs. MT. MARUBAI.

A. I. R. 1936 Nag. 233.

Sec. 526 (8)—*Refusal to adjourn a case under Sec. 526(2)—if sufficient ground in itself for a transfer—Bona-fide mistake of law—no ground of transfer.*

On a Magistrate refusing to believe the plea of illness by the accused, an application was made for stay of proceedings to move the High Court for transfer. The application was rejected.

Held, the order refusing to stay was an irregularity as the mandatory provision under Sec. 526 (8) was neglected. Although a bona-fide mistake of law on the part of a Magistrate is not in itself a good ground of transfer, the flagrant disobedience of the obligation to adjourn the case under Sec. 526 (8) was sufficient reason for granting a transfer. (*Gruer J.*)

NARAYAN vs. BALA URKUND KUMBI.

A. I. R. 1936 Nag. 446 = 165 I. C. 425 = 37 Cr. C. L. J. 1146 = 1936 Cr. C. 693.

Criminal Procedure Code (Contd.)

Secs 526(8) & (9)—*Application for adjournment—order adverse to accused passed on same date on which application filed—Court, if can reject application.*

Where in the course of a trial in a Sessions case, the Court cancels the bail bond of an accused and orders that he be taken into custody and subsequently on the same date the accused makes an application under Sec. 526(8), Cr. P. Code, for adjournment of the case, the Court is not justified in rejecting the application under sub sec. (9) of Sec. 526. (*Iqbal Ahmed J.*)

SALIG RAM vs. EMPEROR.

1936 A. W. R. 967.

Sec. 528(2)—*Complaint against near relation of District Magistrate—Case transferred to Sub divisional Magistrate for disposal—Objection by complainant that such Magistrate would be called as witness—Case should be transferred from the file of the Subordinate Magistrate.*

A complaint against a "near relation" of the District Magistrate should be tried by Magistrate who is of equal rank of the District Magistrate. Where a District Magistrate transfers a complaint against the Superintendent of Police; who is his brother-in-law, for disposal to a subordinate Magistrate, and objection is taken by the complainant to trial by such Magistrate on the ground that he would be called a witness, the case should be transferred for disposal to the file of some other Magistrate. (*Baguley J.*)

J. W. ATKINSON vs. S. W. H. XAVIER,

162 I. C. 986 = 37 Cr. L. J. 723 = A. I. R. 1936 Rang. 242.

Sec. 528(2)—*Magistrate transferred after hearing arguments in a case—Judgment not passed—Transfer of the case to that Magistrate for judgment if legal.*

The accused were prosecuted before the Magistrate of M, for certain offences. Charges were framed against them, after hearing of the prosecution evidence. Defence witnesses were examined and arguments heard, and the case finally posted for judgment when the Magistrate was suddenly transferred. The accused requested a de novo trial before the new Magistrate, who referred case to the District Magistrate. The District Magistrate there-

Criminal Procedure Code (Contd.)

upon transferred the case to the place where the Magistrate who had heard arguments might pronounce judgment.

Held, however convenient the transfer might be it was not warranted by the Criminal Procedure Code, and the transfer was illegal. 56 M. L. J. 216 referred. (*King J.*)

MURUGAPPA THEVAN vs EMPEROR.

70 M. L. J. 244=1935 M. W. N. 1281
=1936 Cr. C. 161=37 Cr. L. J. 223=
160 I. C. 104=A. I. R. 1936 Mad. 163.

Sec. 531—"Local area" meaning of the expression.

The expression "local area" used in Sec. 531, Cr. P. Code, is not confined to a province but includes all local area governed by the Cr. P. Code, which extends to the whole of British India. Hence where an offence is committed at one place but is wrongly tried at another place, the court of which place assumed jurisdiction in the ~~belief~~ that the offence was committed there, *held*, that Sec. 531 applied, and the sentence passed by the court was not liable to be set aside if the accused had not been prejudiced by reason of the trial being held in that place. 16 Cal. 667 & 9 Rang. 338 relied.

DIWAN SING MAFTOON vs. EMPEROR.

37 Cr. L. J. 474 (2)=1936 Cr. C. 367=
A. I. R. 1936 Nag. 56=161 I. C. 635.

Sec. 536(2)—Offence triable by jury, tried with the aid of assessors—no objection taken—legality of the trial.

When an offence under Sec. 436, I. P. C. is tried by a Sessions Judge with the aid of assessors in a place when it is triable by a jury, but no objection as to the legality of the procedure adopted, is taken by the accused, the validity of the trial cannot be challenged subsequently, as the defect is clearly remedied by Sec. 536 (2) Cr. P. Code (*Grille & Gruer JJ.*)

SAKHAWAT vs. EMPEROR.

19 N. J. 320.

Sec. 537(a)—Illegality or irregularity when surable under section.

The sole criterion given by Sec. 537 for deciding whether an illegality or irregularity in the trial is surable under Sec. 537, is whether the accused person has been prejudiced or not. Where two persons are

Criminal Procedure Code (Contd.)

tried together on different charges which are not jointly triable but the accused are not prejudiced thereby, no retrial should be ordered even though it is found that the joint trial was not legal. 55 All. 301 relied on. (*Collister J.*)

BHOWANI PATHAK & ORS. vs. EMPEROR.

• 161 I. C. 869=A. I. R. 1936 All. 253.

Sec. 537(a)—Joint trial of several accused persons—Objection must be taken at the time of trial—Irregularity, if any.

An accused objecting to his trial jointly with others must take an objection, in the course of proceedings. It will not do for him to apply for quashing the proceedings or conviction unless such joint trial has caused prejudice to the accused or entailed a failure of justice. (*Derbyshire C. J. & Costello J.*)

RASHBHARY SHAW vs. EMPEROR,

1936 Cr. C. 1043=A. I. R. 1936 Cal. 753.

Sec. 537(d)—Charge to Jury—misdirection—failure of justice not caused—sentence, if should be set aside.

An appellate Court finding misdirection is not bound to set aside the sentence unless it finds that the misdirection had in fact occasioned a failure of justice. (*James & Saunders JJ.*)

HARI MAHTO vs. EMPEROR.

A. I. R. 1936 Pat. 46=160 I. C. 675=37 Cr. L. J. 320=1936 Cr. C. 70.

Sec. 540—Court's duty to record evidence if it thinks it necessary.

A Magistrate should not examine any witness under Sec. 540, merely because the complainant chooses to suggest the examination of witness; but if he himself thinks that the evidence of the witness is essential he is not only allowed to examine the witness but is by law bound to do so. (*Allsop J.*)

RAMBHAROSEY vs. EMPEROR.

1936 A. W. R. 70=1936 A. L. J. 303
=162 I. C. 47=37 Cr. L. J. 522=1936 Cr. C. 246=A. I. R. 1936 All. 269.

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Sec. 540A—Magistrate, if can dispense with attendance of accused who is ill.

The language of Sec. 540A, Cr. P. C., cannot be construed as to authorise a magistrate to dispense with the attendance of an accused on the ground of illness. (*Mackney J.*)

KO KO GYI vs. EMPEROR.

A. I. R. 1936 Rang. 114 = 161 J. C. 240 = 1936 Cr. C. 181 = 37 Cr. L. J. 436.

Sec. 545—Order for payment of compensation—Appeal against conviction—Complainant, if entitled to be heard.

Although an appellate Court cannot be said to be acting without jurisdiction in not sending notice to the complainant, yet nevertheless, an appellate court should, in the exercise of a proper discretion, give notice of the hearing of the appeal to the complainant when an order of compensation has been made in his favour under Sec. 545, Cr. P. Code. In such a case, the complainant should be allowed to appear, and to put forward such points as he may desire. (*Grillo J.*)

BALWANT MARATHE vs. MOTILAL JAIN.

I. L. R. 1936 Nag. 147 = 19 N. L. J. 140 = 165 I. C. 641 = 1936 Cr. C. 694(2) = A. I. R. 1936 Nag. 144.

Sec. 545—Order directing payment of compensation to complainant—Appeal by accused—Omission to issue notice of appeal, to complainant, if amounts to an illegality.

Although it is desirable that in an appeal from a conviction in which an order for payment of compensation to the complainant is passed, notice should be served on the complainant of the hearing of the appeal, the omission to issue such a notice does not amount to an illegality, because, an order of acquittal passed by the Court of appeal would involve the extinguished of the order for payment of compensation. There is no provision of law which requires that notice of appeal should be issued to the complainant in the trial court. 53 Cal. 969 distinguished. (*Maya Bu J.*)

HTANDA MEAH vs. ANAMALE CHETIAR.

A. I. R. 1936 Rang. 247 = 163 I. C. 242(2) = 37 Cr. L. J. 832 = 9 R. R. 6 = 1936 Cr. C. 593 = 1.

Criminal Procedure Code (Contd.)

Sec. 545 (1) (b)—Order directing payment of compensation, if extinguished on the conviction being set aside in appeal.

Where an order under Sec. 545 (1) (b), Cr. P. Code, directing payment of compensation is passed on conviction of an accused, and the conviction is subsequently set aside on appeal the necessary consequence is that the order granting compensation would also be extinguished. (*Mya Bu J.*)

HTANDA MEAH vs. ANAMALE CHETIAR.

A. I. R. 1936 Rang. 247 = 163 I. C. 242(2) = 37 Cr. L. J. 832 = 1936 Cr. C. 593.

Sec. 545 (1) (b)—Unqualified midwife attending on a woman convicted of offence under Sec. 304 (a), I. P. C.—validity of order granting compensation to the children of the woman.

Where an unqualified midwife was convicted of having caused the death of a woman by her rash and negligent act, and an order was made directing compensation to be paid to the children of the deceased woman out of the fine inflicted on the midwife, held, that the order of compensation was illegal and without jurisdiction. (*Dunkley J.*)

MAUNG SEIN vs. EMPEROR.

37 Cr. L. J. 199 = A. I. R. 1935 Rang. 471 = 159 I. C. 1026.

Sec. 552—Action under the section, when can be taken.

The District Magistrate cannot act under Sec. 552 Cr. P. Code, unless there is a complaint before him on oath of the abduction or unlawful detention of a woman or of a female under the age of 16 years. (*Thom J.*)

MOTI vs. BENI.

1936 A. W. R. 920 = 1936 A. L. J. 1097 = 1936 A. Cr. C. 192 = 1936 Cr. C. 1111 A. I. R. 1936 A. 1. 852.

Sec. 552—Applicant under Sec. 552, if required to be examined on oath at the time of presenting application.

An application under Sec. 552, is not a criminal complaint, in which the applicant has to be examined on oath. Omission to examine on oath an applicant under Sec.

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552, Cr. P. C. may, be a defect in procedure but does not vitiate the order passed by him. (*Bennett J.*)

DELPAT RAI vs. EMPEROR.

A.I.R. 1936 All. 90

Sec. 552—*Order under the section when can be made where the girl living with another person voluntarily.*

When a girl is living in another man's house voluntarily, but against the will of her mother lawfully entitled to have charge of her, the question whether an order under Sec. 552, Cr.P. Code should be issued or not depends entirely on the question of the girl's age. (*Dunkley J.*)

MA NGWE vs. MAUNG YE.

A.I.R. 1933 Rang. 494.

Sec. 552—*Order under the section—Nature of.*

—There is nothing in Sec. 552, Cr. P. Code which requires service of the order on any person. The order is one capable of execution, and the section lays down that the Magistrate may compel compliance with such order using such force as may be necessary. (*Niamatullah J.*)

ABDUL JALIL KHAN vs. EMPEROR.

1936 A. W. R. 210=162 J. C. 753=8 R. A. 903=37 Cr. L. J. 713=1936 Or. C. 80=1936 A. L. J. 220=1936 Cr. C. 418=A. I. R. 1936 All. 354.

Sec. 561-A—*Power of High Court to expunge remarks from judgment of lower Court, when and how to be exercised*

The High Court has an inherent power to expunge a portion of a judgment by an inferior Court. The power is unbounded by law, but being of extraordinary character should be exercised with care and caution in exceptional cases, as it is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly, and because in weighing evidence and in arriving at conclusions on questions of fact lower Courts have often to make remarks which reflect adversely on the character of witnesses. Where however a judgment by a lower Court comments adversely upon a person who is not party to the proceedings

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and has not had a fair opportunity of being heard, or contains remarks based upon no evidence or evidence not properly upon the record, the High Court in order to prevent abuse of the process of the Courts and secure the ends of justice should delete such passages in the judgment. Similarly, the High Court will delete such portions of a judgment, which though based on evidence damage the character of a person, when the character of that person is wholly irrelevant to any point in issue. Judgment which is couched in language wholly injudicious and uncalled for, should be deprecated. A. I. R. 1928 Lah. 740 referred. (*Coldstream J.*)

EMPEROR vs. ATTAULLAH SHAH BUKHARI.

A.I.R. 1936 Lah. 429

Sec. 561-A—*High Court, if has power to grant bail or extend time to surrender after conviction by High Court and actual grant of leave to appeal by Privy Council—Magistrate's order, refusing extension, if may be interfered with in revision—Position after grant of leave to appeal—Power to grant bail, if revives.*

Per Henderson J.:—It would not be proper for the High Court, after the disposal of a criminal case by the High Court, and before leave to appeal has been actually granted by the Privy Council, to extend the time either itself or by way of revising the order of the Magistrate, (although it has the power) for the accused to surrender.

Per Ounliffe J.:—It may be that after grant of leave by the Privy Council there is a fresh seisin of the case by the High Court and its powers in regard to bail are revised.

BABU LAL CHAUKHANUS, THE EMPEROR
40 C.W.N. 1313

561 A—*Acquittal of accused of charge under Sec. 366, Penal Code—Subsequent proceedings under Secs. 497 & 498, Penal Code, if liable to be quashed.*

The accused were originally tried of the offence of kidnapping under Sec. 366, Penal Code, but were on appeal to the High Court acquitted on the ground that the

Criminal Procedure Code (Contd.)

girl in question went of her own accord to the house of the accused and there was no taking or sending. Subsequently a fresh prosecution was launched against the accused apparently on the same facts under Secs. 497 & 498, Penal Code. *Held*, that the later proceedings constituted an abuse of the process of the Court and was liable to be quashed under Sec. 561A, Cr. P. Code. (*Lort Williams & Jack JJ.*)

MUHAMMED HUSSAIN & ORS. vs. BHO-LA NATH DAS.

162 I.C. 176 = 37 Cr.L.J. 538 = 1936 Cr.C. 357 = A.I.R. 1936 Cal. 225

Sec. 562—Offences punishable with fine if comes within the purview of the section.

The expression "offence punishable with imprisonment for not more than seven years" is intended to be read in the same sense as the expression in Sub-Sec. (1A) "offences punishable with not more than two years imprisonment," and that both expressions were intended to cover offence punishable with a less severe sentence than those indicated and therefore to include offences punishable only with fine. (*Beaumont C. J., N. J. Wadia & Divatia JJ.*)

VAIJAPPA SHIVALINGAPPA HUMBER-WADDI,

60 Bom. 55

CRIMINAL TRIAL.

Appeal—Accused convicted in *de novo* trial, ordered by appellate Court—nature of plea that can be taken by accused in appeals.

Under the law it is perfectly open to an accused person to raise any plea of law or fact which may make for his acquittal. Therefore when an appeal is filed from a conviction passed by a Court on a *de novo* trial ordered by the appellate court, and the accused prefers an appeal from such conviction, the appellate court, is unquestionably bound by the final order which directed the retrial, but it cannot be held bound by any reason given in the previous case to sustain it. There is nothing like res-judicata in a criminal trial as long as it does not terminate in either acquittal or conviction so as to attract the provisions

Criminal Trial (Contd.)

of Sec. 403, Cr. P. Code, and there is nothing to estop an accused person from showing that the act with which he is charged as penal did not constitute an offence, and that on a right interpretation of the enactment under which he is sought to be penalised, it should be held that the legislature never intended that any one placed in his position should be criminally liable. (*Neogi & Gruer A. J. Cs.*)

DIWAN SINGH MAFTOON vs. EMPEROR.

161 I.C. 635 = 37 Cr.L.J. 474(2) = 1936 Cr.C. 367 = A.I.R. 1936 Nag. 83.

Appeal—Accused, if can ask for higher sentence to have right appeal.

It is the nature of the sentence which does or does not give the right of appeal, and it is not open to an accused person to say that he should have been given a higher sentence so that he might have a right of appeal. (*Allsop J.*)

ANANT SINGH & ORS. vs. EMPEROR.

1936 A. L. J. 209 = 161 I. C. 307 = 1936 A.W.R. 129 = 1936 Cr.C. 175 = 37 Cr.L.J. 417 = A.I.R. 1936 All. 147.

Appeal—Application to Privy Council for special leave to appeal in criminal cases—such leave, when granted.

The Privy Council not being a Court of criminal appeal, will not entertain an application for special leave to appeal from orders of conviction passed by the Courts in India. Where however there has been a difference of opinion in the High Courts of India with reference to an important provision in the Criminal Procedure Code, and it is considered desirable that the doubts and difference of opinion should be finally resolved, the Privy Council will grant appeal. (*Lord Blanesburgh.*)

NAZIR AHMAD vs. THE CROWN

38 P.L.R. 802 = 1936 A.W.R. 754 = 17 P.L.T. 593 = 38 Bom. L.R. 698 = 44 M. L.W. 213 = 1936 Cr. C. 752(1) A. I. R. 1936 P.C. 253(1) (P. C.)

Appeal—Trial exhibiting neglect of fundamental rules necessary for protection of prisoners—Privy Council, if will interfere.

Where a criminal trial was so conducted as, in three separate respects, viz., the exclusion of the statement, restriction of the address by Counsel, and the neglect of the rule requiring corroboration, exhib-

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ited a neglect of the fundamental rules of practice necessary for the due protection of prisoners and the safe administration of criminal justice, held, that under the circumstances the Privy Council was justified in interfering with the orders passed by the trial court. (Sir Sidney Rowlatt.)

MAHADEO vs. EMPEROR.

40 C.W.N. 1164=1936 A.W.R. 541=
44 M.L.W. 253=1936 M.W.N. 889=
1936 Cr.C. 757=37 Cr.L.J. 914=A.I.R.
1936 P.C. 342.

Appeal—*Appeal to Privy Council—principle of interference in criminal cases—evidence that no legitimate inference of guilt is possible—Privy Council, if will interfere.*

Although the Judicial Committee will not interfere in a criminal case merely because its conclusion as to the guilt or innocence of the accused differs from that of jury, still where, on the evidence taken as a whole there are no grounds on which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the accused was guilty, and any conclusion on the available materials would be, and is a mere conjecture or guess, the Judicial Committee will interfere and set aside the verdict of conviction as one based on grounds not permissible in law or justice. (Lord Roche.)

STEPHEN SENEVIRANTE vs. THE KING.

41 C.W.N. 65=44 M.L.W. 661=37 Cr.
L.J. 983.

Benefit of doubt—*trial for murder—motive not proved—evidence incomplete—accused, if entitled to benefit of doubt.*

Where, in a trial for murder, the evidence adduced on behalf of the prosecution on certain points, was not convincing and no true explanation of the motive for the crime was forthcoming, and the Sessions Judge did not properly examine witnesses for the purpose of ascertaining the motive, held, that under the circumstances, the evidence as presented to the Court, would not justify the Court in convicting the accused of murder. As there was ground for doubt, the accused was entitled to be given its benefit. (James & Varma JJ.)

Criminal Trial (Contd.)**EMPEROR vs. HARDWAR SHA.**

37 Cr.L.J. 1061=1936 Cr.C. 810=A.
I.R. 1936 Pat. 486=164 I.C. 1079.

Benefit of doubt—*Plea of alibi taken at early stage of investigation—presence of accused at place of offence appearing doubtful—benefit of doubt if can be given to him.*

In the trial of an offence under Sec. 147, Penal Code, the accused took the plea of alibi, but from the evidence his presence at the affray seemed to be doubtful. Held, under such circumstances the accused was entitled to the benefit of the doubt. (Currie J.)

PINDI DAS. vs. EMPEROR.

38 P.I.R. 680=37 Cr.L.J. 748=1936
Cr.C. 508=A.I.R. 1936 Lah. 473=163
I.C. 135.

Burden of proof—*Onus of proving innocence—Accused if must bring forward facts to explain away suspicion raised by evidence.*

Per Lord Williams, J.—The onus of proof in criminal cases never shifts to the accused and they are under no obligation to prove innocence or adduce evidence in their defence or to make any statement. Consequently, it is misdirection to draw the jury's attention to the fact that the accused had failed to give any explanation of the facts adduced in evidence against him in trial when the attention of the accused was not specifically drawn to those facts during his examination.

Per Nasim Ali J.—Although the proof of a case against the accused must depend not on the absence of any explanation on his part but upon the positive affirmative evidence of his guilt that is adduced by the prosecution, still if a certain appearance is made out against the accused and he is involved by the evidence in a state of considerable suspicion, he is called upon for his own safety to state and bring forward the circumstances, which might reconcile such suspicious circumstances with perfect innocence.

EMPEROR vs. BENOYENDRA CHANDRA PANDE vs. ANR.

63 Cal. 929=40 C.W.N. 432=64 C.L.J.
154=37 Cr.L.J. 394=1936 Cr.C. 145=
161 I.C. 74=A.I.R. 1936 Cal. 73,

Criminal Trial (Contd.)

Burden of proof—Accused leaving his home with his wife one day—Body of woman discovered in neighbouring village—Burden of explaining what happened to his wife.

The accused left his home one day in company with his wife and the latter was not subsequently seen alive by any one but her body was discovered in a neighbouring village. The evidence showed that the accused suspected his wife to be unfaithful to him. *Held*, that there was heavy onus on the accused under the circumstances of the case and in view of the motive for murdering his wife, to explain what happened to her after they had set out together. (*Young C. J. & Monros. J.*)

FAZAL KARIM vs. EMPEROR.

A.I.R. 1936 Lah. 580 = 1936 Cr.C. 651

Charge—Clerical error in charge if vitiates proceedings.

A mere clerical error in the form in which a charge is framed does not vitiate the charge, so as to render a conviction on that charge bad, unless the accused has been in any way prejudiced by the error in the framing of the charge. (*Jack J.*)

ABINASH CHANDRA KUMAR vs. DHANI BUKSH MOHAMMED.

82 C.L.J. 487 = 1936 Cr.C. 930 = A.I.R. 1936 Cal. 673 = 165 I.C. 905.

Charge—Additional charges, when and how may be introduced.

Where the accused was originally prosecuted for cheating and criminal breach of trust, but subsequently charges of conspiracy were added by the prosecution, as also some other charges, and the Sessions Judge tried all these charges together and convicted the accused of cheating and criminal breach of trust together with conspiracy, without considering whether there was sufficient evidence to prove conspiracy *Held*, that the Sessions Judge should not have allowed the charge of conspiracy to be introduced without the prosecution authorities producing sufficient evidence in support of the charge of conspiracy. (*Cunliffe & Henderson JJ.*)

AMITABHA GHOSH vs. EMPEROR.

1936 Cr.C. 954(2) = A.I.R. 1936 Cal. 693.

Criminal Trial (Contd.)

Charge—Must state the offence precisely.

It is one of the elementary principles of criminal law that an accused person must know what the precise accusation against him is before he is called upon to enter on his defence. (*Monroe & Rangilal JJ.*)

INDAR PAL vs. EMPEROR.

37 Cr. L. J. 732 = 1936 Cr. C. 389 = A.I.R. 1936 Lah. 409 = 162 I.C. 969.

Complaint—Complaint against near relation of Dist. Magistrate—Transfer of the case to a subordinate magistrate, if proper.

Where a complaint is filed against a near relation of a District Magistrate, it should only be enquired into by a Magistrate, who cannot in any reasonable sense of the word be described as a subordinate of the District Magistrate. As a rule, it should be transferred for disposal to a magistrate who is entirely independent of the District Magistrate. An order by the District Magistrate transferring such a complaint to one of his subordinates for disposal is, although not illegal, certainly not proper (*Baguley J.*)

J. W. ATKINSON vs. S. W. H. XAVIER,

1936 Cr.C. 519 = 37 Cr.L.J. 723 = 162 I.C. 988 = A.I.R. 1936 Rang. 345.

Complaint—Officer of rank, if can claim to have complaint against him tried by senior magistrate.

An officer of the rank of a Deputy Commissioner of Police is entitled to have a complaint preferred against him tried by a senior magistrate and not by a subordinate magistrate. It is therefore not proper for the District Magistrate, if he does not take up the case himself to transfer it to a subordinate magistrate for decision; what he should do is to transfer it to a magistrate of equal rank. (*Baguley J.*)

J. W. ATKINSON vs. S. W. H. XAVIER.

1936 Cr.C. 519 = 37 Cr.L.J. 723 = 162 I.C. 988 = A.I.R. 1936 Rang. 242.

Confession—Value of retracted confession.

When a confession is retracted, it becomes very unsafe to use the contents of

Criminal Trial (Contd.)

that confession against any co-accused who is undergoing a joint trial with the person who made the retracted confession as to his responsibility for the crime he is accused of. But on the other hand a judge sitting alone after due consideration and taking into consideration all extraneous facts such as statements made by the police officers who were originally in charge of the person confessing, the statement of the magistrate who took down the confession and the general tone of the confession itself together with the probabilities to be attached to the explanatory statement retracting confession can accept the confession as being a true and proper account of the necessary happenings to support the prosecution case before the Court. 22 Cal. 164 relied on. (*Cunliffe & Henderson, JJ.*)

KALIJIBAN BHATTACHARJI & vs. EMPEROR.

63 Cal. 1053 = 63 C.L.J. 232 = A.I.R. 1936 Cal. 316 = 163 I.C. 41 = 37 Cr.L.J. 775 = 1936 Cr.C. 537.

Confession—Internal indication that confession not voluntarily made. — Value of such confession against co-accused.

Where the questions put by the magistrate to satisfy himself as to the voluntary nature of a confession are all of stereotype character, and there are internal indications in the confession which suggests that the confession was not the outcome of the confessing accused's own desire to state what he knew, and the confession is subsequently retracted, it is of little value against the co-accused and even against the confessing accused, not much importance is to be attached to it. (*Niamatullah & Gangnanath JJ.*)

MAUJI & ORS vs. EMPEROR.

1936 A.W.R. 248 = 1936 A.L.J. 669 = 1936 Cr.C. 501 = 162 I.C. 914 = A.I.R. 1936 All. 388.

Confession—Confession implicating others and exculpating the confessor—Value of confession.

A confession which seeks to implicate other persons whilst carefully safeguarding the conduct of the person confessing is really of no value and all that it is useful for is to testify to the various happenings which involved other people. Such a confession should therefore be considered with

Criminal Trial (Contd.)

great caution. (*Cunliffe & Henderson, JJ.*)

EMPEROR vs. GOSTHO SARDAR & ORS.

A.I.R. 1936 Cal. 407 = 165 I.C. 438 = 37 Cr.L.J. 1149 = 1936 Cr.C. 676.

Confession—Conviction, if can be based on a confession wanting in material particulars when there is no other corroborative evidence and the confession is subsequently retracted.

A conviction cannot be sustained on a confession made by an accused which is wanting in those material particulars which one would ordinarily expect in a free and voluntary confession and which is not otherwise corroborated by other reliable evidence, and there is no other evidence to connect the accused with the crime, more so, where the confession is subsequently retracted. (*Subedar A. J. O.*)

GANGA DUTTA vs. EMPEROR.

I.L.R. 1936 Nag. 94 = 162 I.C. 925 = 37 Cr.L.J. 715(2) = 1936 Cr.C. 552 = A.J. R. 1936 Nag. 87

Confession—Accused pointing out place where offence was committed but not mentioning it in his confession Confession subsequently retracted. Fact of pointing out the place, if can amount to corroboration.

The accused who was charged with offences under Secs. 395, 397 & 398. Penal Code, made a confession which was subsequently retracted. In the confession there was no mention about the place of the dacoities, but the accused subsequently pointed out certain place in connection with the dacoity. Held, that the mere fact that certain place were pointed out by the accused could not be taken to be corroboration of any of the matters in the confession. (*Allsop & Gangnanath J. J.*)

EMPEROR vs. CHHADAMMI LAL.

1936 A.W.R. 185 = A.I.R. 1936 All. 373 = 162 I.C. 948 = 37 Cr.L.J. 730 = 1936 Cr.C. 497(2)

Confession—Statement of accused while in police custody before headman such statement if can be placed on record and headman if can be allowed to give oral evidence of it.

Where a policeman arrested the accused and took them to the headman, and there had their statement taken down by the headman

Criminal Trial (Contd)

and subsequently the statements so taken down was placed on the record and the headman was allowed to give oral evidence of it, held that the procedure adopted by the police was highly discreditable and improper and the action of the police in having the statement of the accused taken down while in custody and while the headman was merely acting as their agent, could not be justified. (*Mosely & Ba U J. J.*)

NGA BA KYAUNG vs. EMPEROR.

37 Cr.L.J. 531=1936 Cr.Cr. 219=A.I.R. 1926 Rang. 131=162 I.C. 6

Confession—Place where a magistrate can record confession.

There is nothing in law to prevent a Magistrate from recording a confession in any other place in open court and very often it is undesirable for a confession to be recorded in open court. (*Dunkley J.*)

MAUNG THA KA DO & ORS. vs EMPEROR.

A.I.R. 1935 Rang. 401

Confession—Propriety of sending back persons making confessions to police custody.

The practice of sending back to police custody, persons who have made a confession should be abolished, because, if confessing persons know that there is a likelihood of their being returned to police custody after making confession, they would be more inclined to make false confessions at the instance of the police than they otherwise would do. (*Young C. J. & Monroe J.*)

NARINJAN SINGH vs. EMPEROR.

17 Lah. 416=38 P.L.R. 820=1936 Cr.C. 298=37 Cr.L.J. 587=162 I.C. 379=A.I.R. 1936 Lah. 357.

Confession—Accused making confession under Sec. 164. Cr. P. C. if may be sent back to police custody.

Where the confession of a person has been validly recorded under Sec. 164, Cr. P. C. it is proper to send back such person to police custody. Such a procedure is highly improper and may damage the whole case in which such a confession is used. (*Young C. J. & Monroe J.*)

ABDUL SATTAR vs. EMPEROR.

Criminal Trial (Contd)

17 Lah. 460=38 P.L.R. 1=1936 Cr.C. 248=37 Cr.L.J. 493=A.I.R. 1936 Lah. 278

Confession—Whether voluntary—mixed question of fact and law.

The voluntary or involuntary nature of a confession involves a mixed question of both fact and law. (*Cunliffe & Henderson JJ.*)

MULAIM SINGH & ORS. vs. EMPEROR.

1936 O.W.N. 838=164 I.C. 422=37 Cr.L.J. 986.

Conviction—Conviction on approver's evidence, if proper.

An accused person should not be convicted solely upon the evidence of an approver. To support a conviction the approver's evidence must be corroborated in material particulars. (*Harris & Rakhpal Singh JJ.*)

EMPEROR vs. MATHUR & ORS.

1936 A.L.J. 518=A.I.R. 1936 All. 337

Conviction—Murder trial—prosecution not supported by two persons named in F. I. Report—evidence of enmity between accused and deceased—conviction, if proper.

Where in a murder trial, the persons mentioned in the First Information Report are not prepared to support the story of the prosecution and there is reason to believe that the accused were falsely implicated in the murder of the deceased, following an old standing enmity between the two, it cannot be said that the charge against the accused has been proved beyond all reasonable doubt, and the accused are entitled to be given the benefit of the doubt and acquitted. (*Nanavutty J.*)

MULAIM SINGH & ORS. vs. EMPEROR.

1936 O.W.N. 838=164 I.C. 422=37 Cr.L.J. 986

Conviction—Offence under Sec. 366 I. P. C.—accused, if may be convicted on uncorroborated testimony of the girl.

In a trial for an offence under Sec. 366 I. P. C., the judge should point out to the Jury that they are entitled, if they please, to convict the accused upon the uncorroborated testimony of the girl, but that it is

Criminal Trial (Contd.)

dangerous to do so in cases dealing with sexual offences, such as, rape, abduction and similar cases and that only in exceptional cases they should convict the accused upon the uncorroborated testimony of the girl. Failure to warn the jury about the danger of convicting the accused, on the uncorroborated testimony of the girl, amounts to a non-direction which vitiates the trial. (*Lort Williams & Cunliffe JJ.*)

CHAMUDDIN SARDAR & ANR. vs. EMPEROR

37 Cr. L.J. 359 = 1936 Cr.C. 170 = A.I.R. 1936 Cal. 18 = 160 I.C. 1028

Conviction—Incriminating articles found in house occupied by accused with other persons—Conviction of accused when justified

It is not the law that no person in possession of a house shall be convicted of being in possession of stolen property or counterfeit coin or anything of that kind if there happened to be other people living in the house and if it cannot be positively established that the person convicted had put the incriminating articles in the place where they were found. The law is that it must be shown in the first place that the incriminating articles were found in a place in the possession of the person to be convicted. In the next place it must be shown either by direct evidence or by circumstantial evidence from which a reasonable inference can be drawn that the person to be convicted knew that these particular things were in the place where they were found. (*Allsop J.*)

TULSHI RAM vs. EMPEROR..

1936 A.L.J. 508 = 1936 A.W.R. 456 = 162 I.C. 292 = 37 Cr.L.J. 551 = 1936 Cr.C. 790 = A.I.R. 1936 All 650

Conviction—Stolen property found in a house occupied by the accused along with other persons—Conviction of accused, if justified.

It is not the law that in no circumstances can a man be convicted of being in possession of stolen property if there are inmates of the house other than himself. All that has been laid down in decided cases is that no person can be convicted if it is

Criminal Trial (Contd.)

doubtful whether he or some other person had guilty knowledge that the property was in the house occupied by him and others. (*Allsop J.*)

HABIB & ORS vs. EMPEROR

1936 A.W.R. 383 = 1936 A.L.J. 511 = 162 I.C. 964 = 37 Cr.L.J. 513 = 1936 Cr.C. 500 = A.I.R. 1936 All. 386

Conviction—Charge of main offence tried by jury and of conspiracy to commit same, not so triable—Verdict of not guilty in respect of all—Acquittal of main offence in accordance with verdict but conviction of conspiracy without giving reasons, disregarding verdict as that of assessors—Conviction, if maintainable.

Where the accused is charged with certain main offences triable by jury and of conspiracy to commit those offences which is not so triable, both with the aid of jury, and the jury returns a verdict of not guilty in respect of all and the judge after acquitting the accused of the main offences in agreement with the verdict, convicts them of conspiracy in the accordance with his own opinion and without giving any reasons, disregarding the verdict as that of assessors, the conviction is not sustainable. (*Cunliffe & Henderson JJ.*)

JOGNESWAR GHOSH vs THE EMPEROR.

40 C.W.N. 1186 = 1936 Cr.C. 737 = A. I. R. 1936 Cal. 527

Conviction—Points both for and against accused, but no clear evidence justifying conviction—verdict of guilty based on conduct, if permissible.

Where there are points both for and against the accused but the greater number merely ambiguous and at the end of the evidence the result is that there is no direct evidence or medical or other circumstantial evidence justifying a conviction, the proper direction to the jury is that they must return a verdict of not guilty or that they cannot safely or properly return any other verdict. To direct or arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused is impermissible. (*Lord Roche.*)

STEPHAN SENIVIRATNE vs. THE KING.

Criminal Trial (Contd.)

41 C.W.N. 65=44 M. L. W. 661=37 Cr. L.J. 936.

Conviction—*Accused if may be convicted on suspicion.*

A Court cannot convict an accused merely on suspicion, when there is no evidence to support the conviction, (*Nanavutty & Zia-ul Hassan JJ.*)

1936 O. W. N. 892=37 Cr.L.J.1085=
1936 Cr. C. 1079=165 I.C. 138=A.I.R.
1936 Oudh 413

Conviction—*Strong suspicion—no ground of conviction.*

An accused cannot be convicted on very strong suspicion unless there is evidence to establish the guilt. (*Varma J.*)

DEONANDAN JHA vs. EMPEROR.

1936 Cr.C. 900(1)=37 Cr.L.J. 1123
=165 I.C. 203=A.I.R. 1936 Pat. 534

Costs—*Accused asking for adjournment if can be directed to pay costs.*

No doubt the criminal courts are empowered to order an accused, if he asks for adjournment to pay costs to the complainant, but this power should not be exercised in such a manner as to place obstacles in the way of the accused properly defending himself. (*Khaja Mohammed Noor J.*)

ISHAR SINGH & ORS vs. SHAMA DUSADH & ORS.

17 P. L. T. 627.

Criminal Liability—*Accused using evidence while his fellow conspirators committing theft—Guilt of the accused.*

The accused along with others went to the land of the complainant with the intention of removing the paddy by force. The accused used the necessary violence on the complainant while their fellow conspirators committed the actual theft. *Held*, that all of them were equally responsible, both for the violence which they themselves committed and the theft which their fellow conspirators committed. (*Mackney J.*)

EMPEROR vs. BASA MEAH & ORS.

37 Cr.L.J. 416=1936 Cr.C. 75=161 I.C.
90=A.I.R. 1936 Rang. 70

Criminal Liability—*Possession of incriminating articles when amounts to an offence.*

Criminal Trial (Contd.)

Possession of incriminating articles, in order to constitute criminal liability must be actual and not constructive. A person cannot be made liable for possessing incriminating articles, of which he is not conscious. (*Currie J.*)

SUNDAR SINGH vs. EMPEROR.

38 P.L.R. 1059=37 Cr.L.J. 739=1936
Cr.C. 768=A.I.R. 1936 Lah. 748=164
I.C. 435

Defence—*omission by accused to take plea of self defence—Court, if may consider plea when supported by evidence—Counsel if may take different line of defence from that of accused.*

If the circumstances of a case show that the right of private defence was legitimately exercised the Court is bound to take into consideration even if self defence was not specifically pleaded. A pleader appearing for the accused can take up a line of defence which is different ~~from~~ which has not been taken up by the accused 79 I. C. 958 ; I. C. 158 relied on (*Dunkley J.*)

NGA BA SEIN vs. EMPEROR.

37 Cr.L.J. 293=1935 Cr.C. 1319=160
I.C. 463=A.I.R. 1936 Rang. 1

Duty of Court—*Manner in which case should be disposed of.*

It is always desirable that a Magistrate in his anxiety to dispose of a case should not act in a manner which may raise a fear in the mind of the accused that he has already made up his mind, (*Khaja Mohammed Noor J.*)

ISHAR SINGH & ORS vs. DUSAD & ORS.

17 P.L.T. 627

Duty of Court—*Rule regarding the completion of a case within six weeks—operation of.*

It is a salutary rule no doubt that magistrates should ordinarily finish cases within six weeks and that they should submit explanations of delay if any case lasts longer than that period, but the rule should not be allowed to interfere with the course of justice or with a fair decision of any case (*Allsop J.*)

MST. KAMNI BEGAM vs. BASHIR-UL-ZAMAN KHAN & ORS.

Criminal Trial (Contd.)

1936 A.W.R. 836=1936 A.L.J. 975=
165 I.C. 20=37 Cr.L.J. 1100=1936
Cr.C. 891=A.I.R. 1936, All' 698

Duty of Court—*Court if may give an accused the benefit of an exception when such exception not relied upon by accused.*

When an accused relies upon an exception, it lies upon him to prove that his case comes within that exception. But where the court, on hearing the prosecution evidence, finds that the accused is entitled to the benefit of an exception, it should not deprive him of that benefit merely on the ground that the accused did not in his own statement or defence evidence rely on that exception. (*Gruer J.*)

BIHADDQ CHHOTELAL vs. EMPEROR.

1, L. R. 1936 Nag. 85=37 Cr.L.J. 1035
1936 Cr. C. 621=164 I. C. 928=A. I.
R. 1936 Nag. 119.

Duty of Court—*Complaint*—*Court must treat as a whole—Trial of offence disclosed by part of complaint—if proper.*

An accused cannot be tried and convicted of an offence which is disclosed by part of the complaint if it is not possible to do so on the entire complaint. Splitting up of facts stated in complaint is irregular. (*King J.*)

MUTHUVELU KUDUMBARAN vs. SAMIAYYA KUDUMBARAM.

59 Mad. 1083=71 M.L.J. 485=1936 M.W.
N.641=44 M.L.W. 631=37 Cr.L.J. 1134=
165 I.C. 292.

Duty of Court—*Complaint against District Superintendent of Police*—*Complainant objecting to trial by magistrate on the ground that he would be called as a witness—Magistrate not taking notice of objection and discharging accused on the ground of want of sanction of local Government—Order, if proper.*

The complainant in a case against the District Superintendent of Police objected to the case being tried by the Magistrate on the ground that the magistrate would have to be called as a witness in the trial. The magistrate notwithstanding the objection, did not transfer the case to any other Court but passed an order discharging the accused on the ground that he could not take cognisance of the offence without sanction of the Local Government. *Held*, that although the action of the magistrate could not be said to be

Criminal Trial (Contd.)

illegal, yet, in view of the circumstances of the case, the matter should have been put an end to in a way correct in every possible detail, and the magistrate should under the circumstances have asked some other magistrate to deal with the case finally. (*Baguley J.*)

J. W. ATKINSON vs. S. W. H. X. XAVIAR.

37 Cr.L.J. 723=A.I.R. 1936 Rang. 447
=1936 Cr.C. 519=162 I.C. 988

Duty of Court—*High Court's power to order objectionable portion of judgment by lower Court to be expunged—Remarks based on no evidence, or against persons who are not party or of damaging character or wholly irrelevant, or couched in unjudicious language or promoting communal enmity should be exercised with caution.*

The High Court has an inherent power to expunge a portion of a judgment by an inferior Court in order to prevent abuse of the process of the Court and secure the ends of justice. Such power ought to be exercised to delete passages commenting adversely upon a person who is not a party to the proceedings and has not had a fair opportunity of being heard, and also to delete passages when they are based on no evidence or evidence not properly upon record. It should also be used to delete passages, which, though based on evidence, damage the character of a person, or are wholly irrelevant to any point in issue, or which is couched in language injudicious and uncalled for. In cases which have assumed a communal aspect, passages in judgment which promote feelings of enmity should also be expunged. But this power is one of an extraordinary character and should be exercised in exceptional cases, because, it is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the High Court. Because in weighing evidence and in arriving at conclusions of facts lower Courts have often to make remarks which reflect adversely on the character of witnesses. (*Goldstream J.*)

EMPEROR vs. ATAULLAH SHAH BUKHARI.

Criminal Trial (*Contd*)

35 P.L.R. 638 = A.I.R. 1936 [Lah. 429 = 162 I.C. 624 = 37 Cr.L.J. 661 = 1936 Cr. 464

Duty of prosecution—*Duty of prosecutor in criminal trial.*

It is the duty of the public prosecutor in a criminal trial to prosecute the accused and not to persecute him, and the responsibility rests on him not to allow the Court to place reliance unwittingly upon the evidence of a witness who has made a statement as to the course of investigation which is demonstrably untrue. 13 Rang. 570 followed. (*Masely & Ba U JJ.*)

NGA SAN BA vs. EMPEROR.

A.I.R. 1936 Rang. 75 = 162 I.C. 14 = 37 Cr.L.J. 414 = 1936 Cr. C. 80

Duty of prosecution—*Duty of prosecution to prove guilt of accused.*

It is one of the fundamental rules of Criminal Jurisprudence that an accused person should never be condemned out of his own mouth. It is the duty of the prosecution to prove, and to prove beyond any reasonable doubt that the accused is guilty. It should improve its case by utilising the defects in the evidence of the defence witnesses or by the false statements which the accused may make. (*Ba U & Mackney JJ.*)

EMPEROR vs. NGAMYA MAUNG.

A.I.R. 1936 Rang. 93 = 1936 Cr.C. 113

Duty of Prosecution—*Relevant facts—Court must try to bring out.*

Where the evidence produced by the prosecution is vague and uncertain, the Court should insist to bring out relevant facts. Where that is not possible the court should give the accused the benefit of the doubt. (*Agha Haidar J.*)

GHAUNS vs. EMPEROR.

160 I.C. 561 = 37 Cr.L.J. 407

Duty of prosecution—*Evidence in criminal trial—duty of the prosecution.*

It is the duty of the prosecution to bring out the relevant facts of a case clearly in the evidence. If this is not done and the evidence remains vague and indefinite, the Court would be fully justified in giving the

Criminal Trial (*Contd*)

benefit of doubt at least to the accused and acquitting him. If a case is tried by the jury and the evidence is not clear and specific, they would be perfectly justified in returning the verdict at least of "not proved." (*Agha Haidar J.*)

GHANNS vs. EMPEROR.

37 Cr.L.J. 407 = 160 I.C. 561

Duty of prosecution—*Manner in which evidence should be placed.*

The duty of every person whether he is a police officer or a constable or a Government officer or a plain citizen is to allow, a case to come before the Court, as it is, without fabrication or 'padding'. It is for the Court to decide whether an accused person is innocent or guilty and not for the prosecution to determine his guilt in advance and attempt to deceive the court into giving a verdict based on false evidence. (*Young C. J & Monroe J.*)

ASHIQ MOHAMMED & ORS vs. EMPEROR.

37 Cr.L.J. 562(2) = 1936 Cr.C. 260 = 162 I.C. 342 = A.I.R. 1936 Lan. 330

Duty of Prosecution—*Hostile witness How to be dealt with.*

It is not right to declare a prosecution witness as hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the Judge. (*Quintiffe & Henderson JJ.*)

SAMAHALI & ORS vs. EMPEROR.

1936 Cr. C. 932 = A. I. R. 1936 Cal. 875.

Evidence—*Murder case—evidence entirely circumstantial—Motive of crime not proved—effect.*

The accused was convicted of the murder by throttling of his step son. The conviction was not supported by any direct evidence, and rested on inferences from circumstantial evidence. There was no proof for motive of the crime.

Held, the accused was not guilty. (*Noor & Rowland JJ.*)

EMPEROR vs. AZHAR MIAH.

37 Cr.L.J. 559 = 161 I. C. 939(2) = A.I.R. 1936 Pat. 425

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Criminal Trial (Contd.)

Evidence—*Cross-examination of prosecution witnesses—Presiding Judge should avoid undue interference in cross examination.*

While it is the duty of every Court to keep the cross examination of a witness within legitimate bounds it must be careful, in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Too much interruption by the presiding Judge in the course of the cross examination of a witness by the Counsel for the accused, has more often than not, the result of robbing the cross-examination of its efficacy and therefore undue interference in cross examination must be avoided by the Presiding Judge. (*Iqbal Ahmad J.*)

SALIG RAM vs. EMPEROR.

1936 A.W.R. 967

Evidence—*Value of uncorroborated testimony of accomplices—Evidence of person who can stoop to bribery Value if such evidence is uncorroborated.*

When persons who are not above stooping to bribery are in that frame of mind they are capable of implicating innocent persons to serve their ends of revenge, just as capable as any other set of accomplices, and the danger of acting on their testimony is not lessened but increased when they willingly come forward to implicate their erstwhile associates. (*Bose J.*)

ANNA CHAMPAT RAO vs. KING EMPEROR.

19 N. L. J. 321

Evidence—*Detective joining game with accused and supplying marked money for placing bets—No corroboration required.*

The act of a detective in supplying marked money for detection of a crime cannot be treated as that of an accomplice and therefore his evidence, though its value would depend upon his character, would not require corroboration. 38 Cal. 96 & 19 Bom. 360 relied on. (*Gruer J.*)

GOVIND BALAJI vs. EMPEROR.

1936 Cr.C. 1039 = A.I.R. 1936 Nag. 245

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Criminal Trial (Contd.)

Evidence—*Witness related to murdered man if incompetent to give evidence on behalf of prosecution.*

In a murder case, the fact that the prosecution witnesses are relatives of the murdered man is not valid reason for discarding their evidence. What would be of importance is that the witnesses had enmity with the accused. Interests of the relatives is undoubtedly to see the true criminal prosecuted; but they can have no interest for accusing anyone falsely unless they have enmity. (*Young C. J. & Monroe J.*)

DILWAR vs. EMPEROR

A.I.R. 1936 Lah. 233 = 1936 Cr.C. 199 = 163 I.C. 1438 = 37 Cr. L. J. 751 = 33 P. L.R. 695

Evidence—*Statements of witnesses produced by one accused if admissible against co-accused.*

There is nothing in the law of evidence or procedure which renders the statements of witnesses produced by one accused inadmissible against a co-accused, but such evidence should be received with great caution and regarded with great suspicion, when the witnesses have nothing or little to say which benefits the person who calls them and appear to be introduced merely with the object of strengthening the case against the co-accused. (*Broomfield & Divatia JJ.*)

SHAPURJI SORABJI & ANR vs. EMPEROR

63 Bom. 148 = 35 Bom. L.R. 106 = 37 Cr. L.J. 685 = 1936 Cr.C. 339 = A.I.R. 1936 Bom. 14 = 162 I.C. 399

Evidence—*Witness if entitled to put in a portion of a letter and to say which portions of it are to go in.*

A court has inherent power for refusing a disclosure of matters which, in the public interest should be kept secret but a witness cannot be allowed to put in a portion of a letter and say which portions of it are to go in and which portions are to be concealed from his opponent. Nor has the Court power to hand back the letter to the party producing it when once it has been made an exhibit in the case. (*Baguley J.*)

E. A. MORLEY vs. EMPEROR.

37 Cr.L.J. 927 = 1936 Cr.C. 631 = A.I.R. 1936 Rang. 298

Criminal Trial (Contd.)

Evidence—One part of statement of witness not free from doubt—court's discretion in the matter.

Where the statement of a witness has been clearly proved to be untrue, there is no manner of doubt that the witness is *prima facie* unreliable; and if his evidence is not reinforced by something else, it is highly unsafe to accept it as the basis of conviction. Where, however, the Court considers one part of the evidence of a witness to be not free from doubt, it may well refuse to act upon it without destroying the value of the rest of it, as all that the Court implies in not acting upon one part of the evidence is that it is not safe to accept it. (*Niamatullah & Collister JJ.*)

ASHIQ ALI & ORS vs. EMPEROR.

1936 A.W.R. 633=165 I.C. 193=37 Cr.L.J. 1104=1936 A.L.J. 885=1936 C.C. 943=A.I.R. 1936 All. 747

Evidence—Conflicting versions of an occurrence—Police should decide which version is true and start prosecution accordingly.

When there are conflicting versions of an occurrence, the police should make up their minds which of the conflicting versions is true, and should send the accused for trial accordingly. (*Nanavutti & Smith JJ.*)

MANGALI vs. KING EMPEROR.

1936 O.W.N. 928=37 Cr.L.J. 1109=165 I.C. 237

Evidence—Statement made to police officer during investigation not reduced in writing and not privileged under Sec. 123 or 124, Evidence Act, if may be used.

There is no reason why a statement made to a police officer in course of an investigation should not, if relevant, under the Evidence Act, be used at a trial for an offence not under investigation when they were made, provided that they are not privileged by the provisions of Secs. 123 & 124, Evidence Act. (*Goldstream J.*)

BAIJNATH BHATNAGAR vs. MAHAMMED DIN.

A.I.R. 1936 Lah. 359=17 Lah. 472=38 P.L.R. 1040=1936 Cr.C 300

Evidence—First information report

Criminal Trial (Contd.)

made two days after occurrence—corroborative value of the report.

The same corroborative value cannot be attached to a belated report made two days after the occurrence, as in a case in which the first information report is made shortly after the occurrence, as in the former case there is plenty of time within which the story for the prosecution could be decided upon and the witnesses to be examined in support of it being obtained. (*Niamatullah & Collister JJ.*)

ASHIQ ALI & ORS. vs. EMPEROR.

1936 A.W.R. 633=165 I.C. 193=37 Cr.L.J. 1104=1936 A.L.J. 885=1936 C.C. 943=A.I.R. 1936 All. 747

Evidence—Murder trial—Testimony of eye witnesses unsatisfactory—recovery of blood stained knife from accused—value of.

The recovery of a knife stained with human blood at the instance of the accused does not strengthen the case against the accused to any appreciable extent when the testimony of the eye witnesses is of an unsatisfactory nature. (*Young C. J. & Abdul Raschid J.*)

MITHA SINGH vs. THE CROWN.

36 P.L.R. 215

Evidence—of eye witnesses found to be unreliable, if can be corroborated by other evidence.

Where two out of three persons tried on a charge of murder were acquitted by the Sessions Judge, on the ground that the evidence of the eye witnesses was wholly unreliable, but the third accused from whose house a blood stained chopper and a blood stained sheet had been recovered was convicted, held, that the conviction was not proper, as the Sessions Judge had used [the evidence of recovery of the chopper and the blood stained cloth to corroborate the evidence which he had not relied on as against the other two. (*Young C. J. & Abdul Raschid J.*)

DHUNDA vs. THE CROWN.

16 Lah. 998

Evidence—Want of interest on the part of the prosecution, if can make the evidence of a witness reliable.

Criminal Trial (Contd.)

It is the duty of the judge who holds the trial to scrutinise the prosecution evidence on its own merits in each case. In the administration of criminal justice, want of interest in the prosecution does not by itself stamp the evidence of a witness with truth. The weight which is to be attached to the testimony of a witness depends in a large majority of cases upon various considerations, some of which are, that on the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may appear to be, his evidence should not be relied on in the decision of criminal cases where persuasion of guilt must amount to moral certainty. (*Subhedar A. C. J.*)

—**MST PARWATI VS. EMPEROR.**

A.I.R. 1936 Nag. 88 = 163 I.C. 319 = 37 Cr.L.J. 821 = 1936 Cr.C. 553

Evidence—Prosecution citing 9 witnesses but examining three—adverse inference, if may be drawn.

When the prosecution does not examine all the witnesses cited, and there is nothing to show that the witnesses not examined would have given material evidence in the case, no adverse inference can be drawn against the prosecution for the witnesses not being examined. The accused, if he wants such witnesses to be produced, are entitled to apply for their production in Court. (*James & Saunders, JJ.*)

HABI MAHTO VS. EMPEROR.

A.I.R. 1936 Pat. 46 = 160 I.C. 675 = 37

Cr.L.J. 320 = 1936 Cr.C. 70

Evidence—Prosecution if can ask Court to look with suspicion upon the evidence of prosecution witness not declared hostile.

When a witness has been produced by the Crown and put forward as a witness of truth in support of the prosecution case, it is not open to the Crown to ask the Court to look with suspicion upon the evidence of such witness, where such witness had not during the whole trial been

Criminal Trial (Contd.)

treated as a hostile witness, nor had any one openly suggested that they were not truthful witnesses. (*Lort Williams & Jack JJ.*)

ABINASH CH. SARKER VS. EMPEROR.

63 Cal. 18

Evidence—Death—Determination of nature of death requiring medical knowledge—Medical evidence divided and undecisive—if may be displaced by direct evidence of fact.

Where the determination of the nature of death involves medical knowledge and skill, and the medical evidence is neither definite nor unanimous, one body of it being to the effect that the circumstances pointed to the application of external force and the other that they pointed to suicide, but neither vouching certainty, such evidence cannot go against the accused, who must be found not guilty. In order that medical evidence may displace direct evidence of facts, it must be clear and decisive. (*Lord Roche*).

STEPHEN SENIVIRATNE VS. THE KING.

41 C.W.N. 65

Evidence—Admission by accused, if may be accepted in part and offence proved by coupling it with other evidence.

Per Lort-Williams J—When the prosecution failing to prove its case by its own evidence seeks to rely upon an admission by the accused, it must take the admission in toto. So, an admission that an act was done at a particular time cannot be dissected so as to take therefrom only the doing of the act and prove, by coupling it with other evidence, that the act was done at a different time. (*Lort William & Jack JJ.*)

UPENDA NATH CHATTERJEE VS. EMPEROR

40 C.W.N. 313

Court, if may allow prosecution to be withdrawn against accused for the purpose of obtaining his evidence—Person so discharged if may be put back on trial or put back in same proceedings.

The Court may consent to the Public Prosecutor withdrawing from the prosecution of any person under Sec. 494(a) Cr. P. C. for the purpose of obtaining his evidence against others placed on trial

Criminal Trial (Contd)

with him, and can do so even in a case to which Sec. 337 Cr. P. C. lies. The person discharged cannot be put back into the proceedings to be tried along with the other co-accused, but may be tried, if he is to be tried, in other proceedings on the same charge. (*Derbyshire C. J. Mukherjee, Panckridge, M. C. Ghosh & Bartley JJ.*)

HARIHAR SINHA vs. THE EMPEROR.

40 C.W.N. 876

Evidence—Accused should be given opportunity to explain adverse evidence—Omission, if vitiates trial

It is the imperative duty of the Judge to elicit from the accused any explanation which he has to give in respect of facts appearing in the evidence against him. In the absence of any such opportunity being given by putting particular points to the accused and asking for his explanation, in respect of those points, the conviction of the accused is bad. (*Burn & Pandrang Row JJ.*)

IN RE KIMIDI NARA SIMHAM.

1936 M.W.N. 521=1936 Cr.C. 763=37 Cr.L.J. 1074=164 I.C. 1017=A.I.R. 1936 Mad. 629

Identification—Identification proceedings—Principles to be followed.

The value of identification depends on two most important factors, namely that the persons who identify an accused have had no opportunity of seeing him after the commission of the crime with which the suspect is put for identification and secondly that no mistakes have been made by those witnesses or the mistakes made by them are negligible. (*Allsop & Ganganath, JJ.*)

EMPEROR vs. CHHADAMMI MALI.

1936 A.W.R. 185=162 I.C. 948=37 Cr.L.J. 730=1936 Cr.C. 497(2)=A.I.R. 1936 All. 373

Identification.—Policemen may be used with caution, in identification parades—evidentiary value of result of identification parades.

There is no objection to the use of policemen in forming identification parades if proper precautions are adopted. Generally speaking, no sweeping conclusion can be

Criminal Trial (Contd)

recorded on the merits of identification parades. (*Monroe & Rangilal JJ.*)

INDAR PAL vs. EMPEROR.

1936 Cr.C. 389=37 Cr.L.J. 732=162 I.C. 969=A.I.R. 1936 Lah. 409

Identification proceedings—Proper procedure to be adopted.

The value of identification depends on the factors which minimise the possibility of a chance as much as possible. The practice of mixing five under-trials with a suspect cannot be regarded as satisfactory in cases in which there is only one or two suspects to be put up for identification. There should be at least 10 under-trials for each suspect in such cases, because, efforts should be made to minimise the possibility of a chance which in the first instance can be done by mixing as many persons as possible with the suspect who is put up for identification. (*Allsop & Ganganath JJ.*)

EMPEROR vs. CHHADAMMI LALI

1936 A.W.R. 185=162 I.C. 948=37 Cr.L.J. 730=1936 Cr.C. 497 (2)=A.I.R. 1936 All. 373

Investigation—Accused attempting to avoid police enquiry—Presumption of guilt if any.

A police enquiry is always regarded as a harassment, and anxiety to avoid it is not necessarily an indication of guilt. (*Mahammad Noor & Rowland JJ.*)

EMPEROR vs. AZHAR MIAN.

37 Cr.L.J. 559=161 I.C. 939(2)=A.I.R. 1936 Pat. 425

Motive—absence of—evidence if vilitated.

The absence of motive is not a sufficient reason for coming to the conclusion that the witnesses in the case are telling lies, or that the confession is false. (*Dhavl & Agarwallah JJ.*)

MT. SUKNI vs. EMPEROR.

1936 Cr.C. 285=37 Cr.L.J. 543=162 I.C. 25=A.I.R. 1936 Pat. 245

Motive—Commission of crime proved—Motive if not proved—effect.

When the evidence adduced by the prosecution goes to show that the accused

Criminal Trial (Contd.)

had committed the crime, it is not necessary to prove the motive of the crime (*Mosley & Ba U. JJ.*)

U. ZAWANA vs. EMPEROR.

1936 Cr. C. 88 = 37 Cr. L. J. 418 = 161 I. C. 113 = A. I. R. 1936 Rang. 80

Jurisdiction—*Offence at two places—one place mentioned in charge—conviction if vitiated.*

Where an offence was committed partially at one place and partially at another, but in the charge, only one place was mentioned, *Held*, that this fact alone could not affect the conviction of the accused, for it could not under the circumstances be said that the accused had been misled in his defence. (*Varma & Rowland JJ.*)

NANKHOO MAHTON vs. EMPEROR.

17 P. L. T. 472 = A. I. R. 1936 Pat. 358 = 163 I. C. 805 = 37 Cr. L. J. 862 = 1936 Cr. C. 588

Jury Trial—*Trial of contradictory cases at same trial and in one charge, if legal.*

It is quite wrong to include two contradictory cases at the same trial even more so in one charge. In a trial for rioting, it is one thing to say that the common object of the accused was to get possession of the disputed land and it is quite another thing to say that the common object was to beat apparently for the mere pleasure of the beating. So where a Judge told the jury that in the event of the prosecution failing to establish the case with which they came into Court or in the event of the jury being unable to come to a decision on a real point at issue between the parties they were to consider the possibility as to the existence of any other common object merely because certain persons were injured and weapons used, *Held*, that the procedure adopted was altogether wrong and what the trial Judge ought to have done was to have struck the latter point out of the charge altogether and never put it before the jury at all. (*Cumtiffe & Henderson JJ.*)

ALKASULLA & ORS. vs. EMPEROR.

A. I. R. 1936 Cal. 429 = 165 I. C. 666 = 30 C. W. N. 1409 = 1936 Cr. C. 654

Criminal Trials (Contd.)

Jury Trial—*Jury returning verdict of guilty and also recommending mercy—effect of.*

In criminal trial, the jury attached to their verdict of guilty a rider recommending the accused person to mercy. *Held*, that this recommendation for mercy did not imply that the jury did not believe the prisoners to be guilty at all. (*James & Saunders JJ.*)

HARI MAHTO vs. EMPEROR.

A. I. R. 1936 Pat. 56 = 160 I. C. 675 = 37 Cr. L. J. 320 = 1936 Cr. C. 70

Jury Trial—*Case under Sec. 366 I. P. C.—Judge must question jury specifically as to the age of the girl.*

In a case of abduction and kidnapping it is the duty of Judges to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge. Unless it is specifically put, the jury cannot really understand what their duty is under Sec. 366 I. P. C. (*Cumtiffe & Henderson JJ.*)

SAMARALI & ORS. vs. EMPEROR

1936 Cr. C. 932 = A. I. R. 1936 Cal. 675

Jury Trial—*Charge to Jury—suggestion for unanimous verdict so that new trial may be avoided, if undue pressure.*

An exhortation for a unanimous verdict made in language which is understood to mean that in case of difference of opinion the troubles of a fresh trial will have to be undergone, is likely to operate on the jury as undue pressure. (*Lord Roche.*)

STEPHEN SENEVIRATNE vs. THE KING,
41 C. W. N. 65

Jury Trial—*View by jury if may include demonstration of sounds and smells—Departure from strict procedure of view if it vitiates trial.*

A view by a jury may include inspection or demonstration of relevant sounds or smells. But in conducting a view it is necessary that the statutory procedure laid down in the Code should be strictly followed and any departure therefrom

Criminal Trial (Contd.)

which is irregular in itself and not merely an exercise of discretion within the limits of the legal procedure tends to divert the due and orderly administration of justice irrespective of any injustice accused. (*Lord Roche.*)

STEPHEN SENIVIRATNE vs. THE KING.
41 C.W.N. 65

Plea of guilt—Informal admission as to guilt, if amounts to plea of guilty.

A plea of guilty in a criminal court can only be made in response to a charge made by the Court. An informal admission as to guilt does not certainly amount to a formal plea of guilt and such an admission has not the same binding effect as a plea of guilty. It has not the same effect in fact and it has not the same effect in law. (*Cunliffe & Henderson JJ.*)

SUPERINTENDENT & REMEMBRANCER OF LEGAL AFFAIRS, BENGAL vs. JIBAN KUMAR DEY & ORS.

A.I.R. 1936 Cal. 295 = 165 I.C. 228(1) = 37 Cr. L. J. 118 = 1936 Cr. C. 529

Presumption of Innocence—in favour of the accused.

In a criminal trial, the accused being entitled to the presumption of innocence, the presumption will be that if the facts will bear an explanation compatible with his innocence, that view should be adopted unless it is proved to be false; but if the circumstances are such that only one inference can follow in the mind of any reasonable man, in such a case there can be a conviction. (*Rowland J.*)

ABDUS SALAM vs. EMPEROR.

160 I.C. 12 = 37 Cr. L.J. 21, 9 = 1936 Cr. C. 142 = A.I.R. 1937 Pat. 108

Presumption of innocence—Criminal breach of trust—Accused to explain suspicious acts.

Although in every criminal case the accused is to be presumed innocent, and the burden of proof never shifts to the defence, yet in a case for criminal breach of trust the accused must show what has happened to the money, as otherwise, there may be

Criminal Trial (Contd.)

an inference that he misappropriated it. (*Vivian Bose J.*)

BAPURAO vs. EMPEROR.

1936 Cr.C. 715 = A.I.R. 1936 Nag. 160

Presumption—Murder—proof of man-slaughter—presumption of murder, if can be raised.

It cannot be maintained that where the evidence for the prosecution points affirmatively no further than man slaughter the law would enlarge the proof and transform the case into one presumptively of murder. (*Sir Sidney Rowlatt*);

MAHADEO vs. EMPEROR.

40 C.W.N. 1164 = 1936 A.W.R. 741 = 1936 M.W.N. 889 = 44 M.L.W. 253 = 1936 Cr.C. 757 = 37 Cr.L.J. 914

Procedure—Magistrate not allowing more cross-examination than he considered necessary—Legality of the procedure.

It is of the utmost importance that the procedure in the trial of a criminal case should inspire confidence in the parties. Where in the trial of a criminal case the magistrate did not allow more than such cross-examination as he thought to be necessary nor did he consider it necessary to have a record of the evidence in the language of the Court, held, that the procedure adopted by the magistrate was not warranted by law. The conviction in such a case was liable to be set aside and the case retried (*Niamatullah J.*)

RADHEY LALL & ORS. vs. EMPEROR.

1936 A.L.J. 667 = 1936 Cr.C. 87 = 1936 A.W.R. 295

Procedure—Trial when begins.

Per Cornish J.—The trial commences with the arraignment of the accused that is to say when the charge is read out to the accused, and he is called upon to plead to it. A. I. R. 1931 Cal. 341 disapproved. 28 Cal. 211 approved.

EMPEROR vs. JOHN MC. IVOR.

1936 M.W.N. 281 = 43 M.L.W. 548 = 1936 Cr. C. 433 = 37 Cr.L.J. 637 = 162 I.C. 592 = A.I.R. 1936 Mad. 353

Procedure—Determination of forum of trial—Choice rests with accused.

Criminal Trial (Contd.)

The only person capable of weighing the respective advantages or disadvantages of a trial before different types of tribunals are the accused persons themselves and it is only their opinion in the matter which is entitled to any serious consideration. (*Henderson J.*)

NETAI CHANDRA vs. EMPEROR.

1936 Cr.C. 785 = 37 Cr.L.J. 1902 = 165 J.C. 162 = A.I.R. 1936 Cal. 529

Procedure—*Counsel can ask the Court to hear the case during hours fixed for sitting of the Court.*

Counsels for the accused are within their right to ask the presiding Judge to hear the case as far as possible during the hours fixed for the sitting of the Court. (*Iqbal Ahmad.*)

SALIG RAM vs. EMPEROR.

1936 A.W.R. 967

Procedure—*Order sheet of another case filed in record of case under appeal—copy of such order sheet sent to appellate Court—copy should be marked 'true copy'—Number given to original should be noted in margin of copy.*

The original order-sheet of another case was filed in the records of the case under appeal and marked as exhibit. At the conclusion of the proceedings the original order sheet was kept in its proper place in the record from which it was taken, and a copy retained.

Held, the copy ought to be certified a true copy and in the margin of it ought to be noted the exhibit number of the original. (*Rowland J.*)

RAGHUNI PROSAD MAHTO vs. EMPEROR.

A.I.R. 1936 Pat. 249

Procedure—*Cross cases—two separate trials—Judgment only one document but decisions separate and distinct—legality of the procedure.*

Two appeals were presented to the Sessions Judge from two separate trials. The appellate court passed judgment in one continuous document, but the decisions in the two cases were quite separate and distinct from each other. None of the findings in the one case was based upon the evidence recor-

Criminal Trial (Contd.)

ded in the other case and the Judgment in regard to each case was a self-contained document based upon its own oral and documentary evidence. *Held*, that the procedure adopted was not illegal and no prejudice could be caused to the accused thereby. 4 Lah. 376 & 56 Mad. 159 distinguished. (*Agha Haidar.*)

LALA PANNA LAL vs. EMPEROR.

A.I.R. 1936 Lah. 294

Procedure—*Propriety of staying a criminal trial pending civil proceedings.*

It is no doubt undesirable that a prosecution connected with a civil suit should be proceeded with until the civil suit is decided; but it would be unreasonable to order stay of proceedings in a criminal court on the off chance that there might be some decision in the civil suit which might have some bearing on the criminal prosecution. (*Mackney J.*)

U THA ZAN vs. U. PYANT.

A.I.R. 1935 Rang. 487

Revision—*limitation a matter of practice—Court's power to hear after period of limitation.*

The limitation for an application for revision is a matter of practice and not prescribed by statute, and when it is in fact admitted and argued, it need not be dismissed on that ground only (*V. Bose J.*)

SYED MAHBUB vs. EMPEROR.

19 N.L.J. 244 = 1936 Cr.C. 1139 = A.I.R. 1936 Nag. 265

Right of accused—*Accused's objection to initiation of prosecution made after commitment—if maintainable.*

Once a commitment is made it is too late for the accused to take an objection against the initiation of the proceedings. Such objections ought to be taken at an earlier stage. 116 I.C. 632, 140 I. C. 514 relied on. (*Dhavlé & Rowland JJ.*)

JUGESHWAR SINGH & ORS. vs. KING EMPEROR.

15 Pat. 26 = 17 P.L.T. 234 = 1936 Cr.C. 539 = 37 Cr.L.J. 893 = 164 I.C. 86 = A.I.R. 1936 Pat. 346

Dangerous Drugs Act (Contd)

it merely implies transfer of a commodity for price paid or promised to be paid. The motive of the buyer is immaterial and the fact that the sale is brought about to entrap the accused, does not make it any the less a sale. (*Niamatullah J.*)

MUNI LAL vs. EMPEROR.

1936 A.W.R. 276=1936 A.L.J. 275.=
37 Cr. L.J. 700=1936 Cr. C. 425=162
I.C. 752=A.I.R. 1936 All 361.

ELECTRICITY ACT (IX OF 1910)

Sec. 39—*Dishonest user.—what it means.*

Abstraction of electric energy is not always a necessary ingredient for an offence under Sec. 39, of the Act. The consuming of electricity and the regular causing of the record of that use in the shape of the figures on the dials in the metres to be altered is a dishonest user. The argument that electric was used in a manner contemplated by the contract, and the act of tampering with the metres was something different from user cannot hold good. (*Derbyshire C. J. & Costello J.*)

RASHBEHARISHAW vs. EMPEROR.

1936 Cr. C. 1043=A.I.R. 1936 Cal. 763.

Secs. 39 & 50—*Offence of stealing electric energy, if an offence against the Electricity Act—Sec. 50, if applies to such offence.*

Where a person interferes with the electric meter and uses Electricity with the intention of not paying for it, he is guilty under Sec. 379 Penal Code read with Sec. 39, Electricity Act. Such an offence is an offence against the Electricity Act, and Sec. 50, of the Act applies to the case so that there can be no prosecution except at the instance of the person aggrieved, i.e., the Electric Company. (*Allsop and Ganga Nath JJ.*)

VISHWANATH vs. EMPEROR.

1936 A.W.R. 842=1936 A.L.J. 955.
=163 I.C. 689=1936 Cr. C. 938=A.I.
R. 1936 All 742.

Sec. 50—*Police instituting prosecution in form but at the desire of Electric Company—Provisions of Sec. 53, if complied with.*

The phrase "at the instance of" in Sec.

Electricity Act (Contd)

50 of the Electricity Act means merely at the solicitation of or at the request of, and the section means that a prosecution should not be instituted by some independent busy body who had nothing to do with the matter. When in a case under Sec. 379, I. P. C. read with Sec. 39 Electricity Act, for the theft of Electricity the police, on a report by the Electric Company, institutes the prosecution in form but there is no doubt that the Electric Company desired the accused to be prosecuted. *held*, that the prosecution was "at the instance of" the Electric Company within the meaning of Sec. 50 of the Act. (*Allsop & Ganga Nath JJ.*)

VISHWANATH vs. EMPEROR.

1936 A. W. R. 842=1936 A. L. J. 955.=
163 J. C. 689=1936 Cr. C. 938=A. I. R.
1936 All 742.

EVIDENCE.

Expert evidence—*Finger print expert value to be attached to his evidence.*

It is going too far to say that the Court must insist upon corroboration of the evidence of a finger print expert. On the other hand the Court must be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and it cannot hold him guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court should examine the expert as to how much experience he has had in the way of comparison of finger prints and how much literature on the subject he had studied. Where there are a large number of points of similarity between the finger impressions found in the rooms where the offence was committed and in the impressions of the corresponding fingers of the accused, the Court has to rely on the expert upon two distinct points, first of all, on the question of similarity between the two marks, which is a question of fact on which the Court can and should, with the assistance of the expert satisfy itself; and secondly, on the point which is one for expert opinion, whether it is possible to find the finger prints of two individuals corresponding in as many points of resemblance

Evidence Act (Contd.)

as are shown to exist between the impressions found in the case before the Court and those of the accused. (*Beaumont C. J. & Macklin J.*)

FAKIR MOHOMMED RANZAN vs. EMPEROR.

60 Bom. 187 = 38 Bom. L.R. 160 = A.I.R. 1936 Bom. 151 = 1936 Cr. C. 335.

Witness falsely implicating one accused—his evidence if can be accepted against another accused.

Where it is definitely proved that a witness has deliberately committed perjury in falsely implicating one accused, it is impossible to accept his evidence against another accused. A. I. R. 1933 All. 314 & A. I. R. 1934 All. 401 relied on. (*Young C. J. & Sale J.*)

JIT SINGH vs. THE CROWN.

160 I.C. 158 = 38 P.L.R. 136.

Sec. 8.—Scope of the Section.

Sec. 8 of the Evidence Act embodies in a statutory form the rule of evidence that the testimony of *res gestae* (that is, the original proof of what has taken place, is always allowable when it goes to the root of the matter concerning the commission of the crime. (*Cunliffe & Henderson JJ.*)

KALJIBAN BHATTACHARJI vs. EMPEROR.

63 Cal. 1053 = 63 C.L.J. 282 = 37 Cr. L.J. 775 = 1936 Cr. C. 532 = A.I.R. 1936 Cal. 316 = 163 I.C. 41.

Secs. 8. & 27—Theft of ornaments—accused finding them out from exact spot where they were buried—such conduct if sufficient evidence of connexion with crime.

The conduct of an accused who gives such information regarding the discovery of stolen property, and finding them from the exact spot where they were buried is admissible in evidence under Sec. 8 of the Act unless the accused explains how he gained knowledge of the location of the things, the inference is that he has located them himself, and when other evidences corroborate, it may be presumed that he was connected with the crime. (*Grille & Gruer J.*)

MT. JAMUNIA vs. EMPEROR.

I.L.R. 1936 Nag. 78 = 37 Cr. L.J. 1047 = 1936 Cr. C. 814 = 164 I.C. 964 = A. I. R. 1936 Nag. 200.

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Secs. 8 & 27—Accused leading police to a certain place and pointing out position where arms concealed—conversation between accused and police during the search, if admissible.

Evidence was given before the Magistrate that on information contained in the confession of an accused, a visit was made by that accused himself together with certain witnesses and Police officers to a spot where arms were concealed and during the time that the arms were dug up on the information of the accused person in custody, various conversations took place between the accused and the Police which amounted to conversations to the detriment of the accused person and actually adding to the confession he had already made. Held, that the whole of the evidence was admissible. (*Cunliffe & Henderson JJ.*)

KALJIBAN BHATTACHARJI vs. EMPEROR.

63 Cal. 1053 = 63 C.L.J. 232 = 37 Cr. L.J. 775 = 1936 Cr. C. 532 = A.I.R. 1936 Cal. 316 = 163 I.C. 41.

Secs. 8 & 32—Gestures made by dying man in course of dying declaration whether admissible in evidence.

Per Broomfield J. Questions put to a dying person together with her gestures in reply to them, cannot be regarded as a dying declaration under Sec. 32 but is admissible in evidence under Sec. 8 of the Evidence Act.

Per Wassoodew J. Gestures made by a person in reply to questions put to her, is admissible under Sec. 32 Evidence Act, as a dying declaration. 7 All. 385 (F. B.); 49 Cal 600; 1 Pat 401 and 5 Lab. 305 relied on.

EMPEROR vs. MOTIRAM

38 Bom. L.R. 818 = A.I.R. 1936 Bom. 372, = 1936 Cr. C. 917 = 37 Cr. L.J. 1140 = 165 I.C. 422.

Secs. 10 & 30—Confession of co-accused who is dead, if admissible.

A confession made by an accused which is found to be admissible as against his co-accused under Sec. 30 of the Evidence Act, owing to the death of the accused before the end of the trial may however, be admitted in evidence against the other accu-

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sed under Sec. 10 of the Act. The question whether the person who made the statement is dead or alive does not affect the application of Sec. 10. (*Srivastava J.*)

SATDEO vs. EMPEROR.

1936 O. W. N. 28=37 Cr. L. J. 182=
159 I. C. 919=A.I. R. 1936 Oudh, 164.
=1936 Cr.C 282

Sec. 10—"Such persons," meaning of—
Condition precedent for application of
section 10.

Before Sec 10 can be applied the prosecution must show *prima facie* that the persons charged had conspired together. There need not be definite proof, but there must be reasonable grounds to show the connection of each of the persons implicated. (*Gruer J.*)

MAHAMMAD ISMAIL vs. EMPEROR.

I.L.R. 1936 Nag. 152=1936 Cr.C. 561
=165 I.C. 913= A. I. R. 1936 Nag. 97.

Sec. 12—Defamation—statements made
by the aggrieved person to other persons
regarding defamation, if admissible.

In a case of defamation the statements made by the aggrieved person to a considerable number of other persons is admissible in evidence in order to assist the Court in assessing the damages to be awarded. (*Dunkley J.*)

MA SEIN TIN vs. U. KYAW MAUNG.

164 I. C. 385=A. I. R. 1936 Rang. 332.

Secs. 18 & 21, Illus. (c) & (d)—
Statement by accused amounting to admission of his presence at the scene of crime—
Admissibility of the statement against the
accused and co-accused.

A statement by an accused which amounts to an admission that he was present at the scene of the crime and that he was accompanying the person who committed the crime, and which is otherwise exculpatory fixing the sole guilt on the other accused, although inadmissible as against them is admissible, for what it is worth against the person making it, under Sec. 18 of the Evidence Act. (*Mosely & Bu U. JJ.*)

NGA DA KYAING & vs. EMPEROR.

A.I.R. 1936 Rang. 131=162 I.C. 6=37
Cr.L.J. 531.=1936 Cr. C. 219.

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Sec. 21—Statement made by accused
before Magistrate—Admissibility in evidence.

The accused was convicted under Sec. 211, Penal Code for having made a false report to the police about the murder of his child by certain persons. In appeal he contended that a statement made by him before a Magistrate had been wrongly put before the jury. Held, that at the time when the said statement was made he was not an accused person but a witness and the statement was therefore not a confession but merely an admission and as such was relevant and admissible in evidence under Sec. 21, Evidence Act subject to its being properly proved. (*Varma & Rowland JJ.*)

NANHOU MAHTON vs. EMPEROR.

17 P.L.T. 472.=163 I.C. 895=37 Cr.L.
J. 862=1936 Cr. C. 558.=A.I. R. 1936.
Pat 358.

Sec. 21—Admission by accused if may
be accepted in part and offence proved by
coupling it with other evidence.

When the prosecution failing to prove its case by its own evidence, seeks to rely upon an admission by the accused, it must take the evidence in toto. Hence an admission that an act was done at a particular time cannot be dissected so as to take therefrom only the doing of the act, and prove, by coupling it with other evidence, that the act was done at a different time. (*Lort Williams & Jack JJ.*)

UPENDRANATH CHATTERJI vs. EMPEROR.

40 C.W.N. 313.

Sec. 24—Court, if may accept confession although the inducement offered is of kind outside the terms of Sec. 24.

If a confession is not voluntary in the wider sense of the term *ex-hypothesi* the person who made it did not do so from any desire to tell the truth. This fact in itself introduces an element of suspicion. In such circumstances if facts are proved which suggest that an inducement of some kind, although outside the terms of Sec. 24, was in fact given, the Court may well refuse to accept the confession as true. (*Ouncliffe & Henderson JJ.*)

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KAILJIBAN BHATTACHARJI & ORS.
vs. EMPEROR.

63 Cal. 1053=63 C.L.J. 232=A.I.R. 1936 (al. 316=163 I.C. 41=37 Cr. L. J. 775=1936, Cr.C. 552.

Sec. 24—*Statement of accused in part inculpatory and in part exculpatory—Rejection of exculpatory part, if legal.*

When a statement of the accused is to be taken against him in order to show that he was present at the time of the alleged offence and took part in it, the whole of his statement should be taken and not merely the inculpatory part of it to the exclusion of the exculpatory part which raised the plea of self-defence. (*Agha Haidar & Skemp, JJ.*)

AHMAN vs. EMPEROR.

38 P.L.R. 105.

Sec. 24—*Non-confessional statement by accused forming part of a whole narrative, if can be torn from its context to make it admissible against accused.*

Although any non-confessional statement made by an accused person to the police can be proved against the accused, still when such statement forms part of a whole narrative given by the accused person it ought not to be torn from its context. The prosecution ought not to be permitted to single out of a confession some stray passage containing the admission of an accused against his own interest. His statement which is inadmissible being a confession cannot be dissected so as to make its parts admissible to support the prosecution. (*Grille J. O. & Neogy A. J. C.*)

JAMES DOWDALL vs. EMPEROR.

31 N.L.R. 215=A.I.R. 1936 Nag. 103=162, J.C. 430=37 Cr.L.J. 607=1936 Cr.C. 605.

Sec. 24—*"Person in authority"—mean- of—Zemindar or Lambardar, whether person in authority, within the meaning of Sec. 24.*

A person in authority referred to in Sec. 24, Evidence Act is one who has authority to interfere in the matter of the charge against the accused. A zemindar or a lambardar cannot be considered to be a person in authority within the meaning of the section. (*Allsop & Ganganath JJ.*)

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JIWAN vs. EMPEROR.

1936 A. W. R. 409=1936 A.L.J. 376=193 I.C. 661=37 Cr.L.J. 952 (2)=1936 Cr. C. 615=A.I.R. 1936, All. 470.

Sec. 24—*Landholder and a member of Union Board if "person in authority."*

A person who is the landlord of the village and member of Union Board is not a person in authority within the meaning of Sec. 24 of the Evidence Act. (*Cunliffe & Henderson JJ.*)

EMPEROR vs. BHAKTA BHUSAN PRAMANICK.

63 Cal 1089=63 C.L.J. 142=40 C.W. N.668=1936 Cr. C. 380=37 Cr.L.J. 676=162 I.C. 636=A.I.R. 1936 (al. 227.

Sec. 24—*Accused making confession to servant of his landlord—such confession if to be deemed to be made to a person in authority.*

The accused made a confession to the servant of his landlord who was a big zemindar, and his servant had considerable authority in the village. Held, that the confession was not admissible in evidence under Sec. 24, Evidence Act, because the servant was to be deemed a person in authority within the meaning of the section 34 I. C. 642; 12 Pat. 241 & 6 O. W. N. 309 referred to. (*Dalip Singh & Rongilal JJ.*)

MOHAMMAD & ANR. vs. EMPEROR.

1936 Cr.C. 150=37 Cr.L.J. 1026=164 I.C. 891=A.I.R. 1936 Lgh. 264.

Sec. 25—*Evidence of disinterested persons—not necessarily true as such.*

It is an elementary principle in the administration of criminal justice that want of interest in the prosecution does not by itself stamp the evidence of a disinterested witness with truth. (*Subhedar A. J. C.*)

MT. PARWATI vs. EMPEROR.

1936 Cr.C. 553=37 Cr.L.J. 821=163 I.C. 819=A.I.R. 1936 Nag 88

Secs. 24 & 28—*Confession made under inducement of escaping punishment if relevant—when made after considerable lapse of time—effect.*

A confession made by an accused while strongly under influence of a promise that

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he would escape punishment is inadmissible in evidence under Sec. 24 Evidence Act. But if at the time of the making of the confession, the Court is of opinion that the effect of the promise had worn off by the time that the confession was made then under Sec. 28, Evidence Act, the confession is admissible. (*Roberts C. J. & Baguley J.*)

SIT RO SAU vs. EMPEROR.

1936 Cr.C. 851 = 37 Cr.L.J. 1137 = 165 I.C. 319 = A.I.R. 1936 Rang. 485

Sec. 25—Statement of co-accused if substantive evidence against another.

The statement of a co-accused made in his own interest cannot be used by the prosecution as substantive evidence to prove that the applicant misappropriated the money realised by him from the tenants. (*Nanavutty J.*)

ASHIQ ALI vs. KING EMPEROR.

1936 O.W.N. 671

Sec. 25—"Village chaukidar, if a police officer within the meaning of the section.

A village chaukidar appointed under Act. XVI of 1873 is a police officer within the meaning of Sec. 25, Evidence Act, and a confession made to him is barred by the provisions of the sections. (*Sulaiman C. J. Niamatullah & Collister JJ.*)

DEOKINANDAN vs. EMPEROR.

1936 A.W.R. 894 = 1936 A.L.J. 999 = 164 I.C. 701 = 1936 Cr.C. 994 = A.I.R. 1936 All. 793 (FB)

Sec. 25—Confession to police officer before investigation, if admissible.

Sec. 25, Evidence Act enacts that no confession made to a police officer shall be proved as against a person accused of any offence. The section itself makes no distinction between a confession made before investigation and a confession made after investigation. A confession to a police officer before investigation is as admissible as a confession made to such officer after investigation. (*Young, C. J. & Monroe J.*)

HUSAINA vs. EMPEROR.

38 P.L.R. 682 = 37 Cr.L.J. 740 = 1936 Cr.C. 327 = 163 I.C. 89 = A.I.R. 1936 Lah. 380

Sec. 25—Statement of a co-accused, if substantive evidence against another.

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The statement of a co-accused made in his own interest cannot be used by the prosecution as substantive evidence to prove the guilt of another co-accused. (*Nanavutty J.*)

ASHIQ ALI vs. EMPEROR.

1936 O.W.N. 671

Sec. 27—Visit by police on information given by accused to a place where arms are found concealed—Conversations taking place there between accused and police, if admissible in evidence.

On information contained in the confession of an accused a visit was made by that accused himself together with certain witnesses and police officers to a spot where arms were found concealed and during the time that the arms were dug up on the information of the accused person in custody various conversation took place between the accused and the police. Held, that the conversations were admissible in evidence as proof of conduct and the whole evidence could not be excluded on the ground that it was tainted by verbal communications made by the accused to the police at the time of the search, specially when it was found that the police acted with complete propriety summoning the search witnesses and conducting the search in their presence, 62 Cal. 575 followed; 21 Bom. L. R. 724 distinguished. (*Cunliffe & Henderson JJ.*)

KALJIBAN BHATTACHARJI & ORS vs. EMPEROR.

63 Cal. 1053 = 63 C.L.J. 232 = 1936 Cr.C. 532 = 37 Cr.L.J. 775 = 163 I.C. 41 = A.I.R. 1936 Cal. 316

Sec. 30—Confessions by accused if may be used against co-accused.

When a confession is voluntarily made by an accused, it can be received in evidence not merely against him but also against his co-accused. (*Dunkley J.*)

MONG THA KA DO & ORS. vs. EMPEROR.

160 I.C. 292 = A.I.R. 1935 Rang. 491

Sec. 30—Value of retracted confession as against co-accused.

Sec. 30, Evidence Act, is an exception to the general rule of English Law and the

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rule which prevailed in India before the passing of the Evidence Act, that the confession of an accused person was only evidence against himself and could not be used against other. The weakness of the guarantee afforded by self implication and the dangerous and exceptional character of the evidence require that the section should be construed very strictly. (*King C. J. & Nanavutty J.*)

BABOO SINGH vs. EMPEROR.

159 I.C. 875 = 37 Cr.L.J. 163 = 1936 Cr. C. 27 = A.I.R. 1936 Oudh 156.

Sec. 31—Admissions—value of.

Sec. 31 of the Evidence Act expressly provides that admissions are not conclusive proof of the matters admitted. (*Lord Thankerton*)

DAULAT SINGHJI vs. KHACHAR MAN-SUR RUKHAD.

64 C.L.J. 21 = 63 I.A. 248 = 1936 O.W.
• E. 418 = 1936 C.L.R. 265 = 162 I.C. 17
= A.I.R. 1936 P.C. 150

Sec. 32 (2)—Dying declaration, value of—mistake or untrue statement in one part—declaration, if must be wholly discarded.

If a dying declaration be such that it is admissible under Sec. 32, Sub-sec. (1) of the Evidence Act, it stands on the same footing as any other evidence, as to its value and credibility. Whether or how far it is to be relied upon is always a question of fact. There can be no special rule in regard to such statement that if there be any mistake or untrue assertion in any part thereof, the whole of the statement must always be discarded. 62 Cal. 987 distinguished. (*Ounliffe & Henderson JJ.*)

NAIMUDDIN BISWAS & ANR vs. EMPEROR.

40 C.W.N. 1377 = 1936 Cr.C. 1129 = A.I.R. 1936 Cal. 793

Sec. 32—Conviction on the basis of a dying declaration only, when justified.

There are many cases in which it is quite safe to convict a person on a dying deposition, but these are cases in which there is absolutely no doubt that the deceased had a good opportunity of knowing who the assailant was and could not have

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been mistaken, and at the same time there is no possible reason why he should be falsely accusing the alleged assailant; but when the recognition though possible was difficult under the circumstances, it is not quite safe to convict merely on the dying declaration or assertion of the deceased. (*Mya Bu & Baguley JJ.*)

NGA PO SI & ANR. vs. EMPEROR,

A.I.R. 1936 Rang. 324 = 164 I.C. 139 = 37 Cr.L.J. 990 = 1936 Cr.C. 696

Sec. 32—"Written statement by person who is dead"—meaning of.

The expression "written statement made by a person who is dead" does not mean that the statement should have been written out by the deceased himself. It is sufficient if it is shown that the statement was dictated by the deceased and was taken down correctly. The best way to establish this is to show that the dictated statement was read over to the deceased and admitted by him to be correct. 49 Cal. 258 relied on. (*Ba U & Mackney, JJ.*)

NGA MYA DA vs. EMPEROR.

160 I.C. 597 = A.I.R. 1936 Rang. 42 = 37 Cr.L.J. 299 = 1936 Cr.C. 31

Sec —40 & 43—Recitals in judgment, how far admissible.

Generally speaking, a judgment is only admissible to show its date and its legal consequences. 59 Cal. 136 relied on. (*James & Saunders JJ.*)

RAGHUNATE SINGH vs. EMPEROR.

15 Pat. 836 = 17 P.L.T. 526 = 165 I.C. 289 = 37 Cr.L.J. 1126 = 1936 Cr.C. 915 = A.I.R. 1936 Pat. 537

Secs. 40 & 43—Ex parte decree for confirmation of possession, if conclusive evidence of possession.

A decree for confirmation of possession cannot be regarded as conclusive proof that the party obtaining such decree was in possession on the date of the decree. (*James & Saunders JJ.*)

RAGHUNATH SINGH vs. EMPEROR.

15 Pat. 336 = 17 P.L.T. 526 = 165 I.C. 289 = 37 Cr.L.J. 1126 = 1936 Cr.C. 915 = A.I.R. 1936 Pat. 537.

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Sec.—47—*Question whether document was written by particular person—evidence of persons acquainted with his handwriting—absence of grounds on which opinion based—effect of.*

Where the question is whether a certain document was written by a particular person, and witnesses say that the writing is in the hand of the accused, but they do not give the grounds on which the opinion expressed by them is based, they should be considered to have merely made a general comparison between the writing in question and the impressions in their minds of the writing of the accused with which they are familiar. The degree of the witness's acquaintance with the handwriting of that person affects the value, but not the admissibility of the evidence of the witnesses. (*Namatullah J.*)

SAQLAIN AHMED vs. EMPEROR.

163 I.C. 264=1936 A.W.R. 799=1936 A.L.J. 317=1936 Cr.C. 187=37 Cr. L. J. 263=A.I.R. 1936 All. 165

Sec. 45—*Value of expert evidence—handwriting expert not acquainted with certain characters and unable to read and write them—effect of.*

The value of expert evidence depends largely on the cogency of the reasons on which it is based, and cannot be the basis of conviction, unless it is corroborated by other evidence. The mere fact that a handwriting expert is not acquainted with certain characters and cannot read or write them does not make him incompetent as an expert in handwriting. (*Niamatullah J.*)

SAQLAIN AHMED vs. EMPEROR.

1936 A.I.R. 119=1936 Cr.C. 187=37 Cr. L.J. 263=169 I.C. 264=A.I.R. 1136 All. 166

Sec.—79—*Certificate of visitors of a lunatic asylum—presumption of genuineness.*

A certificate of the visitors of a lunatic asylum which, under the provisions of Sec. 473, Cr. P. Code is receivable as evidence, is a public document when written on the usual Government form and signed by the Superintendent of the Asylum, and as such, its genuineness is to be presumed under the provisions

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of Sec. 79, Evidence Act. Formal proof of such a certificate is not necessary. (*Lort Williams & Jack JJ.*)

KALIDAS SARKAR vs. EMPEROR.

63 Cal. 425

Sec. 60.—*Confession recorded in accordance with law—presumption that arises.*

Where a confession has been recorded strictly in accordance with the law, the usual presumption arises under the provisions of Sec. 80, Evidence Act, that the confession was voluntarily made. The burden lies on the accused to show that the confession was not voluntary. (*Dunkley J.*)

MAUNG THA KA DO vs. EMPEROR.

A.W.R. 1935 Rang. 491

Secs. 105 & 106—*Accused firing at police party—No injury caused to any one—Accused pleading that he fired only to frighten the police and escape arrest—Burden of proof.*

Where an accused pleaded that he fired at the police in order that he might escape arrest, it was for him to state that fact in his examination before the Court, and to adduce evidence in support of that statement as laid down in Sec. 106, Evidence Act. If the accused takes up the defence that he fired merely with the intention of frightening the police officer by firing in the air, then the burden of proving that, is upon the defence under Sec 105 Evidence Act. (*King C. J. & Nanavutty, J.*)

EMPEROR vs. MUNSIL.

1936 O.W.N. 553=162 I.C. 844=37 Cr.L.J. 797=1936 Cr.C. 648=A.I.R. 1936 Oudh 294

Sec. 114—*Defamation of bad conduct towards step-daughter—Plea of jurisdiction by truth—Evidence of step daughter, if relevant.*

In a case of damage for defamation alleging bad conduct against step-daughter the evidence of the step daughter is not relevant. If she is not examined no presumption can be drawn against the plaintiff. There may be a presumption against the defendant, specially when he pleads truth.

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of his statement in justification. (*Dunkley J.*)

MA SEIN TIN vs. U. KYAW MAUNG.

164 I.C. 385 = A.I.R. 1936 Rang. 352

Sec. 114—*Police officer refusing to remember date by refreshing memory—Adverse inference if any.*

The Police officer when asked about the date of the arrest of the accused, refused to refresh his memory from notes. An adverse inference can be drawn against the police officer for such refusal. (*Dalip Singh J.*)

LAL SINGH vs. EMPEROR.

35 P.L.R. 881 = 37 Cr.L.J. 910 = 1936 Cr.C. 736 = 164 I.C. 736 = A.I.R. 1936 Lah. 707

Sec. 114 Illus. (a)—*Presumption under Sec. 114(a) when arises—Accused in possession of stolen goods several months after theft—Reasonable explanation of possession given—Presumption does not arise.*

Under Sec. 114 illustration (a) the Court may, if the circumstances justify it, draw a presumption of guilt against a person who is in possession of stolen property; but the section does not lay down that whenever a person is in possession of stolen goods a presumption of his guilt automatically arises. If the accused is in possession of the goods after several months have elapsed or is able to give an apparently reasonable explanation of his possession of the property, the presumption will not arise. (*Collister, J.*)

GIYAN CHANDRA vs. EMPEROR.

1936 A.L.J. 1158 = 1936 A.W.R. 973

Sec. 114 Illus. (a)—*Presumption under the section, if may be drawn from omission of accused to account for possession when Jury does not believe explanation, if correct—Explanation which may be made if reasonably true, though disbelieved, if excludes presumption.*

The presumption under Sec. 114 Illus (a) of the Evidence Act cannot be drawn against an accused person on account of his failure to account for his possession of

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stolen goods unless he is asked to account for such possession. To tell the Jury that they can make the presumption if they do not believe the explanation of the accused to be true, is misdirection. The presumption cannot be made when the explanation may reasonably be true, although the Jury do not believe it. (*Lort Williams & Jack JJ.*)

SURENDRA NATH GHOSH vs. EMPEROR.

40 C.W.N. 1090

Sec. 114 Illus. (b)—*Detective not an accomplice—evidence does not require corroboration.*

A person who joins a gaming house with marked money, to help in the detection of a crime is a police spy or decoy, and not an accomplice. His evidence therefore though its value would depend upon his character would not require corroboration. (*Gruer J.*)

GOBINDA BALAJI vs. EMPEROR.

1936 Cr.C. 1039 = A.I.R. 1936 Nag 245

Sec. 114, Illus. (b)—*Evidence of accomplice—value of.*

It is well settled that an accomplice is unworthy of belief, unless he is corroborated in material particulars by independent testimony. The evidence of one accomplice is not available as corroboration of another. (*Nanavutty J.*)

BHABUTI & ORS vs. EMPEROR.

1936 O.W.N. 848 = 165 FC. 144 = 37 Cr.L.J. 1096

Sec. 114 Illus. (b)—*Conviction on uncorroborated testimony of approver, if proper.*

No matter how strong a motive is proved it is unsafe to convict on the evidence of an approver unless there is corroboration connecting or tending to connect the particular accused with the crime itself. (*Young C. J. & Monroe J.*)

KARTAR SINGH vs. EMPEROR.

17 Lah. 518 = 162 I.C. 511 = 1936 Cr.C. 555 = 37 Cr.L.J. 597 = A.I.R. 1936 Lah. 400

Sec. 114 Illus. (b)—*Approver, evidence of corroboration necessary.*

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An accused person should not be convicted solely upon the evidence of an approver. To support a conviction the approver's evidence must be corroborated in material particulars. (*Harries & Rachpal Singh JJ.*)

MATHURI & ORS. vs. EMPEROR.

1936 A.L.J. 518=1936 A.W.R. 1=
1936 Cr.C. 403=163 I.C. 253=A.I.R.
1936 All. 337

Sec. 114 (b)—Evidence of accomplice—must be corroborated in material particulars—witnesses who turn accessories after the commission of the crime—their evidence also liable to corroboration.

The evidences of an accomplice or accessory must be corroborated in some material particulars not only bearing upon the facts of the crime but upon the accused's implication in it, and the evidence of one accomplice was not available as corroboration of another. Similarly evidence of persons who were accessories after the commission of the crime cannot be accepted as proving the guilt of the accused without corroboration in material particulars by independent witnesses. (*Nanavutty & Ziaul Hassan J. J.*)

BEJIPAL SINGH vs EMPEROR.

A.I.R. 1936 Oudh 413

Sec. 114, illus. (b)—Vain to be attached to the testimony of a wife who though cognisant of intended murder of her husband kept silent.

Where the wife of the deceased though aware of the fact that the accused intended to kill her husband did not disclose the same to her husband and the latter was actually killed by the accused, held, that she must be regarded as an accomplice and her testimony could not be accepted without corroboration in material particulars in the trial of the accused (*Young C. J. and Abdul Rashid, J.*)

PHULLU & ANR. vs. THE CROWN.

38 P. L. R. 226=164 I.C. 700=37 Cr.L.
J. 908=1936 Cr.C. 766=A.I.R. 1936
Lah 731

Secs. 114, illus. (b) & 133—Evidence of police—nature of corroboration required.

It is not necessary that the story of an accomplice should be corroborated in every

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detail of the crime, nor it is necessary that the corroboration should itself be enough for conviction when it is established that there are good grounds for believing the accomplice's story by reason of the existence of corroboration on material points implicating any of the accused, the Court can safely come to a conclusion as to the truth of the whole story on uncorroborated points so far as they implicate the same accused person. (*Roberts C. J. & Baguley J.*)

GAPOOR & ANR. vs. EMPEROR.

A. I. R. 1936 Rang. 373=164 I.C. 677=
37 Cr. L. J. 992=1936 Cr.C. 775

Secs. 114, illus. (b) & 133—Scope of the section.

Illus (b) to Sec. 114, Indian Evidence Act which lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, must be read along with Sec. 133 of the Act, and neither rule is to be ignored in the exercise of Judicial discretion. (*King C. J. & Nanavutty. J.*)

BABU SINGH vs. EMPEROR.

1936 O.W.N. 84=159 I.C. 875

Secs. 114, illus. (b) & 133—Evidence of accomplice—necessity of corroboration—nature of corroboration required—one accomplice, if may corroborate another.

The evidence of an accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication therein. Further, the evidence of one accomplice is not available as corroboration of another. (*Sir Sidney Rowlett.*)

MAHADEO vs. EMPEROR.

40 C.W.N. 1164=1936 A.W.R. 747=
1936 A.L.J. 869=163 I.C. 631=44 M.L.
W. =37 Cr L.J. 914=1936 M.W.N. 889=
38 Bom L.R. 1101=1936 Cr. C. 757=
A. I. R. 1936 P.C. 242 (P.C.)

Sec. 114, illus. (4)—Presumption under the section—accused giving some reasonable explanation which may not be true when entitled to an acquittal.

Under Sec. 114, illustration (a) of the Evidence Act the Court may presume that a man who is in possession of stolen goods,

Evidence Act (Contd.)

soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. If he gives an account of his possession which may reasonably be true though the jury are not convinced that it is true, and there is no other evidence of his guilty knowledge the accused is entitled to acquittal, (*Lort Williams & Jack, J. J.*)

DAUD SHAIKH vs. KING EMPEROR.

40 C.W.N. 159=62 C.L.J. 257

Secs. 114(b) & 133—Evidence of one approver, if admissible to support that of any other approver.

Illus. (d) appended to Sec. 114, Evidence Act, which says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, has never been and cannot be taken as overriding the plain provisions of Sec. 133 which expressly states that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. It is in every case a question of fact whether the evidence of the approver is acceptable or not. If the accomplice's testimony carries conviction to the mind of the judge as to its truth on its own intrinsic merit, there is in reality, no need for any corroboration. In cases tried by Jury, it is invariably the practice to caution the jury of the danger of convicting upon the uncorroborated testimony of an accomplice. If the jury has been cautioned by the judge, the verdict cannot be set aside for the simple reason that there is no independent corroboration of the accomplice's testimony. 17 N.L.R. 113, 8 Pat. 235, 35 Mad. 237; 9 Rang. 404 & 62 Cal. 238 referred to; 16 N. L. R. 186 distinguished. (*Gruer J. C. & Neogi. A. J. C.*)

JAMES DOWDALL vs. EMPEROR.

31 N.L.R. 215=A.I.R. 1936 Nag. 103=
162 I.C. 430=37 Cr.L.J. 607=1936
Cr.C. 37605

Secs. 118 & 133—Scribe prosecuted for abetment of forgery, but acquitted on appeal—value to be attached to his evidence.

Where a scribe of a *rukka* is prosecuted

Evidence Act (Contd.)

for abetment of forgery, but is acquitted in appeal and thereafter called to give evidence in the case, his evidence is virtually that of an accomplice in the crime, and if it is to be believed, it requires strong corroboration in material particulars. (*Nanavutty J.*)

GAURI vs. EMPEROR.

1936 O.W.N. 268=61 I.C. 602=37
Cr.L.J. 518

Sec. 133—Persons who had knowledge of conspiracy to commit a crime but not actively connected, if an accomplice—Evidence of such persons.

The evidence of witnesses who were aware of the conspiracy, and of the objects of the same, and who were merely tools in the hands of the leaders of the conspiracy for a certain time, are not accomplices, and their evidence cannot be viewed with the same suggestion as the evidence of an accomplice. (*Gruer & Bartley J. J.*)

NARAIN CHANDRA BISWAS vs. EMPEROR.

63 Cr.L.J. 191=1936 Cr.C. 200(2)=37
Cr.L.J. 445=161 I.C. 289=A.I.R. 1936
Cal. 105

Sec. 153, Excep. (1)—Rule relating to the cross-examination of a witness for the purpose of impeaching his veracity.

A witness may be cross-examined with a view to impeach his veracity of his impartiality. This rule is so important that while with regard to some matters when a witness is cross-examined as to his veracity, the cross-examiner has to take his answers and is not entitled to rebut them, by exception (1) to Sec. 153, it is provided that if a witness is asked any question tending to impeach his impartiality and he answers it by denying the facts suggested, he may be contradicted. (*Baguley J.*)

E. A. MORLEY vs. EMPEROR.

A.I.R. 1936 Rang. 299=37 Cr.L.J. 327=
1936 Cr.C. 631=164 I.C. 369=A.I.R.
1936 Rang. 799

Sec. 157—Evidentiary value of first information report.

The first information report cannot be used as a piece of positive evidence directly supporting the case of the prosecution. It

Evidence Act (Contd.)

can only be used either to corroborate or contradict the testimony of the person making it. (*Skemp, J.*)

HARNAM SINGH vs. CROWN.

38 P.L.R. 203 = 165 I.C. 146 = 37 Cr.L.J. 1079 = 1936 Cr.C. 833 = A.I.R. 1936 Cal. Lah. 533

GOVERNMENT OF INDIA ACT (1915)

Sec. 49—Order by Bengal Government directing prosecution of certain persons for offences under Arms Act in exercise of powers conferred by the Bengal Suppression of Terrorist Outrages Act—Order affixed with Government seal—Such order, if required to be proved.

An Order was passed by the Government in exercise of powers conferred by Sec. 25 of the Bengal Suppression of Terrorist Outrages Act directing that certain person be tried by a Magistrate with the powers of a special Magistrate for offences under the Arms Act. The order ended with the words "by order of the Government in Council" and was signed by the Under-Secretary to the Government of Bengal. *Held*:—

Per Cunniffe J.—that the order was not a copy but an original document within the meaning of Sec. 49, Government of India Act and could not be called into question or required to be proved in the manner laid down in Sec. 78, Evidence Act.

Per Henderson, J.—There is nothing in the terms of Sec. 49, Government of India Act to suggest that the proof of the existence of such an order is dispensed with. Sec. 49 does not in plain terms, empower the Court to take judicial notice of such an order. It is however open to the prosecution to adopt any legal mode of proof they please. Although Sec. 78, Evidence Act provides a convenient mode it is by its very terms not exhaustive.

KALIJIBAN BHATTACHARJEE & ORS. vs. EMPEROR.

63 Cal. 1053 = 63 C.L.J. 237 = 37 Cr.L.J. 1751 = 1936 Cr.C. 532 = A.I.R. 1936 Cal. 316 = 163 I.C. 41

GOVERNMENT OF INDIA ACT (1915)

Sec. 72-D(7)—"By reason of his speech or vote"—meaning of—Question by Member

Govt. of India Act (Contd.)

of Legislative Council, containing defamatory statement of another if privileged.

The expression by reason of his speech or vote" in Sec. 72 D (7) of the Government of India Act includes any utterance of the vocal organs made at any time in such council and is not confined to the mere formal discourses which form part of debate. Thus a question embodying defamatory matter is privileged from proceedings in any Court of law. (*Roberts C. J. Baguley & Leach J. J.*)

O. P. KHIN MAUNG vs. AN QU & ANR.

14 Rang. 420 = 37 Cr.L.J. 1018 = 1936 Cr.C. 843 = 164 I.C. 960 = A.I.R. 1936 Rang. 425

Sec. 72-D(7) Standing orders of Burma Legislative Council—Or. 28(3) Member asking question is protected from legal responsibility in law Courts—He is morally responsible to President and Council, as also to his electorate.

Standing Order 28 (3) provides that no question shall be asked unless he shall have given an assurance to the President that he has checked the source of his information, and that he can prove to the satisfaction of the President that the question is accurate. (*Roberts C. J.*) (*Baguley & Leach J. J.*)

KHIN MAUNG vs. AU EU WA.

14 Rang. 420 = 37 Cr.L.J. 1013 = 1936 Cr.C. 843 = 164 I.C. 960 = A.I.R. 1936 Rang. 425

Sec. 107 Who may apply.

Under Sec. 107 of the Govt. of India Act, 1915 it is open to the High Court to take cognisance of any proceeding taken by the District Judge under Sec. 36 Legal Practitioner Act, on information supplied by any person. Thus the Bar Association of a place though not entitled to appear as of right, may be allowed by the High Court to appear and place proper materials for justice to be done. No order for costs can under any circumstances be passed against them. (*Jai Lal J.*)

DISTT. BAR ASSOCIATION HOSHIARPUR vs. BAWA RAM SINGH & ORS.

1936 Cr. C. 177 = 165 I.C. 963 = A. I. R. 1936 Lah. 352.

Govt. of India Act. (Contd)

Sec 107—Sentence passed under *Bengal Suppression of Terrorist Outrages Act (XII of 1932)*, if may be reduced under *Government of India Act, Sec, 107*.

Sec. 107 of the Government of India Act ought not to be invoked to revise a legal sentence passed by a special Magistrate, under the Bengal Suppression of Terrorist Outrages Act, any appeal from or revision of which class of sentence is barred by Sec. 5 of the Bengal Suppression of Terrorist Outrages (*Supplementary*) Act. (*Cunliffe & Henderson JJ.*)

MADAN MOHAN RAY vs. EMPEROR.

63 Cal. 1086 = 40 C. W. N. 735 = 37 Cr. L. J. 1025 = 164 I. C. 798.

IDENTIFICATION OF PRISONERS ACT (XXIII) OF (1920)

Sec. 5 Provisions of the section, if applicable to investigation under *Bengal Excise Act*.

Sec. 5 of the Identification of Prisoners Act applies to proceedings of investigation under the Bengal Excise Act. (*Guha & Bartley, JJ.*)

J. E. GUBBAY vs. EMPEROR.

63 Cal. 780 = 40 C. W. N. 415 = 1936 Cr. C. 196 = 37 Cr. L. J. 438 = 161 I. C. 238 = A. I. R. 1936 Cal. 65

INDIAN STATES (PROTECTION AGAINST DISAFFECTION) ACT (1922)

Sec. 3—Place of trial.

The offence of publishing a libel under Sec. 3 of the Indian States (Protection against Disaffection) Act, 1922, is deemed to be committed only at the declared place of publication. The offence cannot be said to be committed at any other place where the newspaper is circulated. A trial for an offence under the Act, can therefore be held only in the place where the alleged libel was initially published. (*Niyogi & Gruer A. J. OS*)

DIWAN SINGH vs. EMPEROR.

37 Cr. L. J. 474 = 1936 Cr. C. 367 = 161 I. C. 635 = A. I. R. 1936 Nag. 55.

INTERPRETATION OF STATUTES.

Principles of interpretation.

Interpretation of Statutes (Contd)

The first principal is that the intention of the legislature is to be ascertained by reference to the words used, and the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, some repugnance or inconsistency with the statute. Where the language of a statute is clear and unambiguous it must be interpreted in its ordinary sense. A reasonable interpretation is to be preferred to one that leads to unreasonable results. The state of the law at the time a statute was passed is a matter to be considered in arriving at the intention of the legislature. (*Dhavl & Rowland. JJ.*)

DWARKA MAHTON vs. PATNA CITY MUNICIPALITY.

15 Pat 36 = 17 P. L. T. 123 = 1936 Cr. C. 398 = 37 Cr. L. J. 634 (2) = 162 I. C. 550.

Statute making general and specific provisions—rule to be followed in construing.

It is a well recognised canon of construction that where there is a specific provision in a statute as well as a general one and the case is covered by the specific provision, it is that specific provision which must govern the case and not the general one. Where therefore, in a criminal case, the law contains a specific provision for dealing with the offence, it is not open to the prosecution to take proceedings under the general provision contained in the statute. (*Barlee & Divatia.*)

EMPEROR vs. BHANA MAKHAN.

38 Bom. L. R. 432 = 1936 Cr. C. 702 = 37 Cr. L. J. 883 = A. I. R. 1936 Bom. 256 = 163 I. C. 847.

Penal statute—principles of construction.

A penal statute, must, no doubt, be strictly applied, but when the intention of the Legislature is clear from the wording of the statute, it must be given effect to. (*Gruer J.*)

BAPULAL IN RE,

I. L. R. 1936 Nag. 89 = 37 Cr. L. J. 588 = 1936 Cr. C. 549 = A. I. R. 1936 Nag. 78

Factors to be taken into consideration in the interpretation of a penal statute.

Interpretation of Statutes (Contd.)

In the case of a penal statute, Courts must not only look on the one side, at the mischief intended to be remedied, but also on the other side, must consider that persons are not to be made subject to penalties unless the offence charged is clearly brought within the purview of the statute. In a penal statute, if an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the commissioners of interpretation fail to solve, the benefit of doubt should be given to the subject and against the legislature which has failed to explain itself. 148 I.O. 607 followed. (*Niyogi & Gruer, A. J. C.s.*)

DIWAN SINGH MAHTOON vs. EMPEROR.

A. I. R. 1936 Nag. 55 = 161 I. C. 435 = 1936 Cr. C. 367 = 37 Cr. L. J. 474 (2)

Act curtailing liberty of subject—principles of construction.

A statute which has the effect of controlling the personal liberty of the subject should be construed strictly, and if anything, in favour of the subject. The Principle should all the more be strictly enforced in India where there is no Act such as habeas corpus upon the statute book. (*Cunliffe & Henderson JJ.*)

NITAI CH. JANA vs. EMPEROR.

37 Cr. L. J. 1062 = 1936 Cr. C. 785 = A. I. R. 1936 Cal. 529 = 165 I. C. 162.

Previous state of the law, when may be taken into consideration.

It is ordinarily not permissible to interpret the words of a statute with reference to the previous state of the law on the subject, but when the words used in a statute are of doubtful import, and particularly when it is contended that the enactment in question was not intended to go beyond the scope of the enactment which was repealed, it is imperative to look into the history of this legislation and examine the circumstances in which it was passed, and thus determine the exact signification of the particular words used in it. (*Niyogi & Gruer, A. J. C.s.*)

DEWAN SINGH MAHTOON vs. EMPEROR.

A. I. R. 1936 Nag. 55 = 161 I. C. 635 = 1936 Cr. C. 367 = 37 Cr. L. J. 474 (2)

JURISDICTION.

Dispute over trade marks and commercial designs—jurisdiction of Criminal Courts.

In deciding whether a dispute over trade marks and commercial designs, should be brought in a Civil or Criminal Court, the test that should be applied is, that the criminal Court should only be approached when there is a simple and clear cut case, and a speedy relief is needed. Where complicated matters, of registration, abandonment of user, etc. are concerned, the dispute should be decided in a Civil Court. (*Cunliffe & Henderson J.*)

ASHUTOSH DAS vs. KESHOB CHANDRA.

1936 Cr. C. 714 = A. I. R. 1936 Cal. 488.

LEGAL PRACTITIONER

Solicitor, if may act for a client when he has a personal interest in the transaction.

A solicitor should not act for a client in any transaction in which he has a personal interest, without, making full disclosure of the nature and extent of the interest he has in the transaction to the client. (*Sir Lancelot Henderson*)

G. F. GRAHAM vs. ATTORNEY GENERAL. FIJI.

44 M. L. W. 312 = 1936 Cr. C. 723 = 163 I. C. 434 = A. I. R. 1936 P. C. 224.

Application by pleader for withdrawing money already withdrawn—Pleader guilty of carelessness but not for misconduct.

A pleader applying for withdrawal of money from Court, which has already been withdrawn is guilty of carelessness but not of dishonesty which can warrant proceedings under the Legal Practitioner's Act. When the Court requires the assistance of pleader for the purpose of enabling it to satisfy itself that the money is due, it certainly expects a greater degree of care on the part of the pleader. (*Mukherjee & S. K. Ghosh JJ.*)

EMPEROR vs. A. PLEADER.

1936 Cr. C. 150 = A. I. R. 1936 Cal. 658.

Legal Practitioner (Contd.)

Advocate removed for criminal offence, if may be re-instated.

The position of an Advocate in the High Court is one of great dignity and responsibility, and therefore an Advocate who offends against criminal law and is convicted and is thereupon removed from the rolls of Advocates, cannot, except in very exceptional circumstances be again admitted as an Advocate and allowed to practice at the Bar. (*Roberts C. J. Baguley & Ba U JJ.*)

T. AN ADVOCATE, RANGOON IN THE MATTER.

14 Rang 390=1936 Cr. C. 706=37 Cr. L. J. 905=A. I. R. 1936 Rang 368.=1641 C. 236.

Terms of contract of engagement—Necessity of reducing contract into writing.

When an advocate enters into a contract with his client, it is appropriate that in order to avoid any further misunderstanding as to the amount of the fees to be charged for various works, there should be a clear written contract between the parties and the amount charged should be clearly mentioned agreed to by the client. (*Sulaiman C. J. Thom & Bennet JJ.*)

RANJIT SINGH, IN RE.

1936 A. L. J. 300=1935 A. W. R. 339. 1936 Cr. C. 423=162 I. C. 622=A. I. R. 1936 All. 359.

Misconduct—Legal practitioner entering in a certificate the fee promised but not actually paid, if guilty of misconduct.

A charge of misconduct cannot be sustained against an advocate who under a misapprehension of law and not acting dishonestly enters in his certificate the fee promised, but not actually paid to him, though the High Court rule contemplates that only the fee actually paid should be entered in the certificate. (*Sir Shadi Lal*).

SHIVA NARAIN JAFI vs. THE JUDGES OF THE HIGH COURT AT ALAHABAD.

58 All 307=1936 A. W. R. 558=38 Bom. L. R. 731=40 C. W. N. 933=63 C. L. J. 521=71 M. L. J. 631=1936 M. W. N. 725=19 N. L. J. 163=17 P. L. T. 429=38 P. L. R. 684=1936 O. W. N. 577=1936 Cr. C. 618=162 I. C. 445=A. I. R. 1936 P. C. 176.

Legal Practitioner (Contd.)

Mistake is record, corrected by pleader after attachment—no malafide intention—pleader, if guilty of professional misconduct.

Where a pleader made an alteration in the name of the *pargana* in the execution petition, the writ of attachment, the notice under Or. 21, r. 66, C. P. Code, and the peon's report on the notice under Or. 21 r. 51, after the attachment had been made, and after these records had become part of the Court records, held, though it might be true that the pleader had no malafide intentions in making those alterations, his conduct in tampering with public records was a serious offence, which could not be overlooked on the ground of his youth and inexperience. (*Countney Terrell, Macpherson & Fazl Ali J.*)

PLEADER OF GAYA, IN THE MATTER OF.

162 I. C. 13.

Pleader permitted to suspend practice and engage business convicted of taking part in a lottery pleader, if liable to be suspended.

A pleader who had been permitted to suspend practice and engage in business, embarked doing with others upon a scheme, which was found to be a lottery. The pleader was thereupon prosecuted and convicted and was later asked to show cause why his name should not be struck off from the roll of pleaders. Held, that the pleader had acted not only wrongly, but very foolishly and his conduct deserved the utmost condemnation from the Court, which looked upon lapses in conduct of persons practising in Courts as more serious than in the case of ordinary citizens. (*Roberts C. J. & Baguley JJ.*)

M M AND ANOTHER, LOWER GRADE PLEADER NYAUNGLEBIN IN THE MATTER OF.

1936 Cr. C. 784=A. I. R. 1936 Rang 382=164 I. C. 360

LEGAL PRACTITIONERS' ACT (XVII OF 1879).

Secs 6 & 13 (F) *Legal practitioner granting certificate under r. 6 of the Rules*

Legal Practitioner Act (Contd.)

framed under Sec. 6 containing false statement regarding probationer, if to be proceeded against under Sec. 13F.

A pleader who intentionally gives a certificate under r. 6 of the Rules framed under Sec. 6 of the Legal Practitioner's Act which are misleading brings himself thereby under Sec. 13F of the Legal Practitioner's Act and is liable to be suspended or dismissed, (*Nasim Ali & Edgely, JJ.*)

P, A PLEADER RANGPUR IN THE MATTER OF

1936 Cr. C. 599=A. I. R. 1936 Cal. 372.

Sec. 12—Conviction under Sec. 121 I.P. C. whether amounts to moral turpitude and makes a practitioner unfit to practice.

A legal practitioner who has been convicted under Sec. 121, Penal Code, is unfit to remain in the ranks of the legal profession and should be disbarred. 36 Bom. L. R. 1136; observation of Beaumont C. J. on page 1148 relied on. (*Beaseley C. J. & King and Lakshmana Rao JJ.*)

M. P. NARAYAN MENON, IN THE MATTER OF

59 Mad. 732=70 M. L. J. 498.=1936 M. W. N. 238=43 M. L. W. 426=37 Cr. L. J. 571=1936 Cr. C. 305=A. I. R. 1936 Mad. 318=162 I. C. 414

Secs. 12 & 13—Power to admit and suspend or dismiss pleader, in whom vested.

Under the Legal Practitioner's Act, the High Court has been entrusted with the power to admit and suspend or dismiss pleaders. That Court may under Sec. 12 of the Act suspend or dismiss a pleader convicted of a criminal offence implying a defect of character which unfits him to be a pleader. That Court may also in cases of misconduct under Sec. 13 of the Act dismiss or suspend a pleader after making such enquiry as it thinks fit. (*Page C. J. & Ba U J.*)

U THEIN NYUN vs. DIST. SUPERINTENDENT OF POLICE, MAUBIN.

13 Rang. 737.

Sec. 13—Pleader's clerk falsely informing client that his case duly filed—pleader, if guilty of improper conduct.

A pleader engaged to file a criminal revision petition, failed to do so. In reply

Legal Practitioner Act (Contd.)

to a post card sent to him by the client, his clerk, however, falsely informed him that the case had been duly filed. On proceedings being subsequently taken against the client, held, that in the absence of materials on record beyond the statement of the pleader's clerk that the false information in the post card was given under the instructions of the pleader, the latter could not be held guilty of improper conduct. (*Tek Chand & Agha Haidar JJ.*)

EMPEROR vs. HARBANS LAL.

1936 Cr. C. 1116=163 I. C. 975=A. I. R. 1936 Lah 1013.

Sec. 13—Misconduct—Attempt to influence judge through his relations. if amounts to misconduct.

A pleader who attempts to bring influence on a judge before whom he is arguing an appeal, through a relative of the judge is guilty of gross misconduct calling for severe punishment. His act is highly reprehensible and in the interest of the legal profession serious notice should be taken of it, (*Addison & Abdul Rashid JJ.*)

EMPEROR vs. G. A. PLEADER, GUJRAT.

1936 Cr. C. 763=A. I. R. 1936 Lah 732=164 I. C. 383.

Sec. 13—Pleader visiting house of Government handwriting expert and conversing with him about a case being investigated into by that officer if guilty of professional misconduct.

The conduct of a pleader in going to the house of a Government handwriting expert and talking to him about a criminal case on which that officer was engaged in official investigation, is highly irregular justifying the taking of disciplinary action under the section. It is immaterial whether the person represented by the pleader was his client or a mere friend or relation. (*Courtney Terrel C. J. Macpherson & Fazl Ali JJ.*)

DAMODAR MISHRA, PLEADER. IN THE MATTER OF.

17 P. L. T. 348=37 Cr. L. J. 626=1936 Cr. C. 643=162 I. C. 116=A. I. R. 1936 Pat 423.

Sec. 13—Misconduct—Advocate of 19 years standing convicted of Criminal

Legal Practitioner's Act (Contd.)

Breach of Trust—disciplinary action, to what extent justified.

It is essential for the protection of the litigant public and also in the interest of the legal profession, that serious notice should be taken of the conduct of an Advocate who abuses the confidence reposed in him by the client. But in taking disciplinary action against an Advocate committed of criminal breach of trust, the Court should take into consideration his standing in the profession and also past record. (*Addison & Abdul Rashid JJ.*)

EMPEROR vs. O, AN ADVOCATE.

1936 Cr.C. 785=163 I.C. 691=A.I.R. 1936 Lah. 717

Sec. 13—Conviction under Burma Village Act—disciplinary action, if justified.

The conviction of a pleader under the Burma Village Act for not removing a stock of hay from his compound in pursuance of a resolution under the Act for the purpose of preventing fire, does not disclose a defect in character which unfits the person convicted to be a pleader and does not call for disciplinary action under Sec. 13, Legal Practitioner's Act. (*Page C. J. & Mya Bu J.*)

H, A LOWER GRADE PLEADER IN THE MATTER OF.

1936 Cr.C. 333=37 Cr.L.J. 623=162 I.C. 534=A.I.R. 1936 Rang. 175

Sec. 13—Pleader carrying on the business of a taxi-cab owner by using his own private car—Enquiry by District Judge if proper.

On information received that a pleader was carrying on the business of a taxi-cab owner by using his own motor-car for the purpose of plying for hire, the District Judge proceeded to hold an enquiry under Sec. 14 Legal Practitioner's Act.

Held. the District Judge had no jurisdiction to hold such an enquiry and the proper course would have been to report the matter to the High Court under Sec. 13 (*Page C. J. & Ba U, J.*)

IN THE MATTER OF S, A LOWER GRADE PLEADER.

1936 Cr.C. 349=37 Cr.L.J. 617=162 I.C. 485=A.I.R. 1936 Rang 189.

Legal Practitioner's Act (Contd.)

Sec. 13(b)—Legal practitioner realising money from client alleging that it was payable to the officers of the Court—action, if amounts to misconduct.

A mukhtear who had been duly paid the expenses and his fees for moving a bail application, wanted and received from the client, after the latter had been granted bail by the Magistrate, a sum of money, on the allegation that it was the custom to pay such money to the court Sub-Inspector, to facilitate the release of the accused on bail. *Held.* that the act of the mukhtear amounted to fraudulent and grossly improper conduct rendering him liable to suspension from practice (*Courtney Terrell C. J. Macpherson & Fazal Ali J. J.*)

KAMTA PROSAD AMBASTA. IN THE MATTER OF.

17 P.L.T. 263=1936 Cr. C. 567=A.I.R. 1936 Pat. 337.

Sec. 13(f)—Pleader carrying on, along with his professional duties, the business of an insurance agent, if guilty of professional misconduct.

A person who enters the profession of law as a pleader must make up his mind to conduct the business of a pleader and nothing else. The practice of a pleader in running the business of an insurance agent along with the business of a pleader, is in the highest degree injurious to the interest of the profession and to the interest of the public, and the pleader in carrying on such business is guilty of professional misconduct. (*Courtney Terrell, C. J., Dhavle & Agarwalla JJ.*)

SHYAMPADA DEY IN THE MATTER OF.

15 Pat. 175.=16 P.L.T. 781=37 Cr.L.J. 230=163 I.C. 23=A.I.R. 1936 Pat. 1.

Sec. 14—Pleader tampering with Court records—liability to suspension.

The tampering of court records is a serious offence, and the offence is all the greater when it is done by a pleader, because the latter by reason of his position in court, enjoys peculiar facilities in handling such records. Such misconduct therefore, even when committed by a young and inexperienced pleader cannot be lightly regarded by the court, and should be punished by the suspension of the pleader from practice. (*Courtney Terrell C. J. Macpherson & Fazal Ali JJ.*)

Legal Practitioner's Act (Contd.)

BRINDABAN PROSAD SINHA IN THE
MATTER OF.

15 Pat. 652 = 17 P.L.T. 266 = 37 Cr.L.J.
580 = A.I.R. 1936 Pat. 418 = 162 I.C. 13

Sec. 14—*Pleader guilty of misconduct before Honorary Magistrate, if can be suspended by the District Magistrate.*

When an Honorary magistrate reported the professional misconduct of a pleader, to the District Magistrate, through the Sub-divisional magistrate, and the Sub-divisional Magistrate on the order of the District magistrate suspended the pleader from practice pending investigation held, that the order was *ultra vires*, because, under Sec. 14 of the Legal Practitioner's Act, the only Court which could suspend the pleader from practice, was the Court before which the alleged misconduct took place. That Court was in the present case, the Court of the Honorary magistrate, (*Dunkley J.*)

U. SAN THEIN vs. DIST. MAGIS-
TRATE MAGUE-

1936 Cr.C. 525 = 163 I.C. 586 = A.I.R.
1936 Rang. 249.

Sec. 14—*Pleader allowing clients' nephew to sign his name—if guilty of misconduct.*

A pleader finding his client unable to sign certain applications on account of a swollen finger allowed his client to write the name of his uncle, as if it were the signature of the uncle.

Held the pleader had not done anything which was deliberately unprofessional, and no disciplinary action could be taken against him. (*Page C. J. & B u J.*)

IN RE, A LOWER GRADE PLEADER.

14 Rang. 152 = 37 Cr.L.J. 721 = 1936 Cr.
C. 328 = 162 I.C. 887 = A.I.R. 1936 Rang
177.

Sec. 36—*Resolution by Bar Association that certain persons were acting as touts—Enquiry by District Judge—Contention that resolution was invalid—offending persons to be given opportunity to show cause before Association—Finding that such persons were not touts—Order for costs.*

The District Bar Association of Hoshiarpur passed a resolution declaring ten persons as touts. The District Judge accordingly

Legal Practitioner's Act (Contd.)

started enquiry, and the member who appeared to give evidence stated that they were unable to say, in view of the considerations placed before them in their examination as witnesses, whether they still adhered to the resolution. The offending persons in showing cause pointed out that the majority of the members of the Association were not qualified to vote, being defaulting members. The District Judge found against the Bar Association, and ordered costs against them.

Held, the District Judge should have treated the resolution of the Bar Association under Sec. 36 of the Act, as evidence of the general repute of the offending persons. The statement of the members that they could not say whether they would adhere to the resolution in view of the consideration, did not amount to a repudiation. The fact that some of the members had ceased to be members by default, was purely a domestic matter, with which the respondents had no concern. The Association however could not be made liable to pay cost to the respondents for finding of the court against them. (*Jailal J.*)

DIST. BAR ASSOCIATION HOSHIAR
PUR vs. BAWA RAM SINGH.

1936 Cr.C. 377 = 163 I.C. 963 = A.I.R.
1936 Lah. 382

LETTERS PATENT (BOMBAY HIGH COURT.)

Cl. 26—*Misdirection in charge to jury, powers of the High Court under Cl. 36 of Letters Patent.*

Cl. 26 of the Letters Patent, Bombay High Court, does not entail that whenever any misdirection is found to exist, the court has no option but to set aside the verdict. To hold that the High Court is bound to set aside the verdict whenever any misdirection is proved would be to disregard the direction in cl. 26, that the High Court is to review the case. Although Sec. 537, Cr. P. Code, does not apply to a case dealt with under Cl. 26, of the Letters Patent, the principle which underlies that section should be applied, and so when there has been no illegality in the mode of trial, but some irregularity in the process of the trial the High Court is not entitled to set aside

Letters Patent (Contd.)

the verdict or judgment unless it is satisfied that that irregularity has led to a miscarriage of justice or has prejudiced the accused, (*Beaumont C.J., Broomfield & N. T. Wadia JJ*)

PUTTAM HASSAN & ANR. vs. EMPEROR.

60 Bom. 599=38 Bom. L.R. 19=37 Cr. L.J. 356=1936 Cr.C. 164=A.I.R. 1936 Bom. 52.

LETTERS PATENT (CALCUTTA HIGH COURT.)

Cl. 26—*Advocate-General, if can be called upon to show cause why certificate should not be granted.*

When an application is made to the Advocate-General for a certificate under Cl. 26 of the Letters Patent and the Advocate-General after due consideration of the matter, refuses a certificate, the High Court has no jurisdiction to issue a Rule to call upon him to show cause why he should not issue a certificate. (*Derbyshire C. J., & Costello J.*)

KURT KRUG vs. ADVOCATE-GENERAL.

63 Cal. 888

MADRAS ABKARI ACT (I OF 1888.)

Secs. 29, r. 27—*Partnership by licensee formed before grant of license—Partners contributing capital—whether it amounts to transfer of license.*

The licensee of a toddy shop entered into a partnership with seven persons who agreed to contribute capital stock and finance the licensee under an agreement that all the seven persons should divide the profit derived equally between themselves.

Held, the mere fact that partners become entitled to a share in the profits of the business in consideration of financing it would not render the transaction illegal. 35 Mad. 582 applied; 69 M. L. J. 490 & 51 Mad. 727 followed (*Venkataramana Rao J.*)

RANGASWAMI PILLAI vs. NARAYAN SWAMI NAICKEN.

A.I.R. 1936 Mad. 557

Sec. 55 (b)—*Offence of manufacturing arrack if includes the offence relating to possession of apparatus for manufacture.*

Madras Abkari Act (Contd.)

The offence of manufacturing arrack as comprised in Sec. 55 (b), Madras Abkari Act includes the offence relating to possession of the apparatus, etc., viz., that comprised in Sec. 55 (G). There cannot therefore be a conviction under Sec. 55 (b), as well as under Sec. 55 (G). Again, if a person unlawfully manufactured arrack, he cannot further be convicted under Sec. 58, for the manufacture itself will give him possession of such arrack. (*Menon J.*)

MEDAPI RAMA RAO & ORS. vs. EMPEROR.

59 Mad. 90=A.I.R. 1936 Mad. 219=I.C. 40=69 M.L.J. 763=42 M.L.W. 651=1936 M.W.N. 946

MADRAS CITY POLICE ACT (III OF 1888.)

Secs. 42 & 43—*Warrant for search of gaming-house—omission to state that it is issued under Sec. 42—effect.*

When a warrant issued under Sec. 43 Madras City Police Act, did not specifically state that it was issued under Sec. 42 or that the authors issuing it "had reason to believe that a common gaming house was held, etc.," but the headings of the warrant and the form used clearly showed that it was a warrant for the search of a gaming house and arrest of persons round therein, *Held*, that the warrant was to be considered one under Sec. 42 and as having been validly issued and the presumption mentioned in Sec. 43 could be raised. (*Menon J.*)

CROWN PROSECUTOR, MADRAS vs. SYED KASIM.

71 M.L.J. 863=1936 M.W.N. 1242

MADRAS LOCAL BOARDS ACT (XIV OF 1920)

Sch. VII, cls. (p) & (q)—*License fee, if can be demanded in respect of printing press worked by hand.*

Cls. (p) & (q) of Sec. VII of the Madras Local Boards Act do not apply to a printing press worked entirely by hand and a Local Board has therefore no authority to demand any license fee in respect of such press. (*King J.*)

Madras Local Boards Act (Contd.)

*SIVA BHUSHANA MUDALIAR vs. PRE-
SIDENT, PANCHAYAT BOARD, TIRUVE-
LLUR.*

59 Mad. 261=70 M.L.J. 113=1936 M.
W.N. 191(1)=43 M.L.W. 200=37 Cr.L.
J. 424(1)=1936 Cr.C. 200(1)=161 I.C.
217=A.I.R. 1936 Mad. 204

**MADRAS PREVENTION OF ADUL-
TERATION ACT (III OF 1918).**

Secs. 2, 5, 18 & 19—*Complain-
t to Second Class Bench Magistrate of offence
under Sec. 5—Transfer to First class
Magistrate, 2 months after commission of
offence—Complaint, if properly filed.*

Under the provisions of Sec. 19 of the Madras Prevention of Adulteration Act, it is only essential that a complaint should be filed within three months of the commission of the offence. It is not the duty of the complainant to satisfy himself that he is applying to the right Court. Filing in due time is essential. But the complaint should be filed with the written consent of the purchaser or of the Local executive officer under the provisions of Sec. 18 of the Act. 1935 M. W. N. 591 followed (*King J.*)

**THE PUBLIC PROSECUTOR vs. CHINTA
VANKATARAYUDU & ORS.**

70 M.L.J. 503=162 I.C. 425=37 Cr.L.J.
627=1936 M.W.N. 210=1936 Cr.C.
622=43 M.L.W. 544=A.I.R. 1936 Mad.
471

**MADRAS VILLAGE COURTS ACT (I
OF 1889)**

Sec. 77—*Person fabricating false
evidence for use in a panchayat court, if
may be prosecuted.*

Sec. 77, Madras Village Courts Act says that nothing in the Cr. P. Code is applicable to village courts except Sec. 463. Therefore Sec 476, Cr. P. Code, not having any application to a village court, it is not open to such a court to file a complaint in respect of an offence under Sec 476, Penal Code, as required by Sec. 195 (1) (b) Cr. P. Code. It follows therefore that a person cannot be prosecuted for fabricating false evidence for use in a panchayat Court. (*Madhavan Nair & Burn JJ.*)

**APPADURAI NAINAR & ORS. vs. EM-
PEROR.**

59 Mad. 195

**MOTOR VEHICLES ACT (XIII OF
1914)**

Secs.--11 & 16—"Ply." meaning of—
*Petitioner taking bus outside prescribed
area in contravention to rules—No evidence
that bus took up passengers outside pres-
cribed area—Petitioner if liable to be
convicted.*

The petitioner took his bus outside the prescribed area and was thereupon convicted for breach of R. 46 of the Behar and Orissa Motor Vehicle Rules. There was no evidence to show that the bus took up any passenger outside the prescribed area. *Held*, that the word "ply" as used in para. 7 of form H, r. 46 of the Behar and Orissa Motor Vehicles Rules, does not mean mere travelling but means driving a vehicle to to take up and put down passengers for reward. There fore it could not be said that there was any plying for hire outside the prescribed area and the petitioner was not liable to be convicted. (*Courtney Terrel C. J.*)

BERRY MAHAPATRA vs. EMPEROR,

17 P.L.T. 378

Sec. 16—*Summons charging accused
with offence under the section containing
no notice of charge—legality of conviction
on such charge.*

Summons issued under the Motor Vehicles Act should state the exact nature of the charge which is being preferred against the person against whom the summons is being issued. The time, the place and exact nature of the offence charged must be clearly set forth. The conviction of an accused person who is neither given notice of the charge preferred against him nor given an opportunity of meeting the prosecution case after the close of the prosecution evidence is illegal. (*Thom J.*)

GAJRAJ SINGH as. EMPEROR.

1936 A.W.R. 874=1936 A.L.J. 1011

Sec. 16—"On demand," meaning of—
*Driver of motor vehicle failing to produce
license immediately, but producing it within
a short time, if may be prosecuted.*

The words "on demand" in Sec. 16, Motor Vehicles Act, mean immediate production and should not be interpreted to mean "within a reasonable time after

Motor Vehicles Act (Contd.)

demand." Where therefore the driver of a motor vehicle fails to produce his license immediately on demand, having kept it in a rather inaccessible part of the car, but produces it within a short time, he is clearly guilty of an offence under the section, although the offence committed is of very technical nature. (*Gruser J.*)

NARSAYYA vs. EMPEROR.

**L. I. R. 1936 Nag. 164=164 I. C. 351
=37 Cr. L. J. 1012=1936 Cr. C. 690
A.I.R. 1936 Nag. 150.**

Sec. 16—*Conviction for failure to carry an attendant—cleaner, if an "attendant" within the meaning of r. 61 of the B. & O. Motor Vehicles Rules.*

A cleaner employed in a bus and entrusted with such duties as loading and unloading luggage, putting water in in the radiator and starting the bus, etc., is not an attendant within the meaning of r. 61 of the B & O Motor Vehicle Rules. The employment of such a person therefore cannot afford any protection to the proprietor of the bus service from being prosecuted under Sec. 16 of the Indian Motor Vehicles Act. (*Saunders J.*)

S. N. GANGULY vs. EMPEROR.

17 P.L.T. 162

Sec. 16—*Rules framed under the section—Punjab Motor Vehicles Rules—Driver of lorry, if liable for offence of carrying excess passengers.*

Under Rule 23 of the Punjab Motor Vehicle Rules, the driver of a motor vehicle is as much responsible for breach of any rule as the owner, where he knows that the rule has been contravened. A driver therefore who carries passengers in excess of those permitted in the licence for the vehicle with full knowledge that he was thereby violating the rule is liable to be prosecuted under the Act, and he cannot escape conviction on the ground that the checker and the ticket-seller were present when the excess passengers were being carried. (*Skemp J.*)

EMPEROR vs. DOYAL.

17 Lah. 604=38 P.L.R. 1015

PENAL CODE (XLV OF 1860)

Sec. 21(10)—*Vice Chairman of Local Board under C. P. Local Self-Government Act, if public servant.*

The Vice Chairman of a Local Board constituted under the C. P. Local self-Government Act is a public servant within the meaning of Sec. 21 (10) of the Penal Code. (*Bose J.*)

ANNA CHAMPAT RAO DESHMUKH vs. EMPEROR

19 N.L.J. 221

Sec. 34—*Applicability—Pre-arranged plan, if necessary ingredient—Common intention how to be inferred.*

It is not necessary for the application of Sec. 34 Penal Code that there should be a pre-arranged plan of doing something which amounts to an offence. Common intention may be conceived of immediately before or at the time of the assault. In general, the precise intention of several persons acting in concert is a matter of inference from their conduct. Where the accused attacked their enemy as soon as they sighted him, all of them using lathies, it should be inferred that all of them became of one mind when they suddenly saw the enemy and entertained the common intention of beating him, 11 A. L. J. 926 relied on; 9 A. L. J. 180 dissented from. (*Niamatullah J.*)

JAIMANGAL & ORS. vs. EMPEROR.

1936 A.W.R. 298=163 I.C. 848=37 Cr. L.J. 864=1936 A.L.J. 462=1936 Cr.C. 601=A.J.R. 1936 All. 437

Secs. 34 & 149—*Distinction between the two sections.*

Sec. 34, Penal Code speaks of a common intention and not common object. The intention means the intention to commit the crime actually committed. Sec. 34 denotes participation in action as distinguished from Sec. 149 which only implies membership of the assembly at the time of the committing of the offence. (*Grille & Neogi, A. J. Cs.*)

JAMES DOWDALL vs. EMPEROR.

**31 N.L.R. 215=A. I. R. 1936 Nag. 103
=162 I. C. 430=37 Cr. L.J. 607=1936 Cr. C. 605**

Penal Code (Contd.)

Secs. 34 & 302—Accused with others planning to abduct—accused armed with dah, but the others using fire arms—common intention to murder, if may be inferred.

The accused with the purpose of carrying out an abduction went out to the place of occurrence with a dah in hand. Later two of his confederates joined him, armed with guns, which they used in the course of carrying out their pursuit causing the death of their victim. *Held*, that although the accused might not have had the intention of committing murder, the fact he took part in the affair, knowing full well that his confederates had come armed with guns, made him a party to the murder and he must be deemed to have had the same intention as his two confederates. (*Baguley & Ba U JJ.*)

A. PLET v. EMPEROR.

37 Cr.L.J. 449=1936 Cr.C. 32=A.I.R. 1936 Rang. 28=161 I.C. 297

Secs. 65 & 422—Sentence of fine of Rs. 1000/- under the section, in default, six month's rigorous imprisonment, if illegal.

As the maximum sentence under Sec. 482, Penal Code is rigorous imprisonment for one year, the imprisonment in default of a sentence of fine imposed under the section, cannot under Sec. 65 Penal Code, exceed three months. A sentence of fine of Rs. 1000 and in default to suffer rigorous imprisonment for six months for an offence under Sec. 482, Penal Code, is therefore illegal. (*Khawaja Md. Noor J.*)

GIRDHARI LAL MARWARI vs. EMPEROR,
17 P.L.T. 67

Sec. 71—Conviction of theft and mischief—Separate sentences, if legal.

Where the accused stole a calf and then killed it, he can be convicted of the offence of theft as well as of mischief under Secs. 379 & 429, Penal Code, and sentenced separately for each case. (*Barke & Divatia JJ.*)

EMPEROR vs BHAWAN SURJI,

60 Bom. 637=38 Bom. L.R. 164=37 Cr.L.J. 557=1936 Cr.C. 354=A.I.R. 1936 Bom. 172=162 I.C. 283

Penal Code (Contd.)

Sec. 71—Accused found in possession of two bullocks belonging to owners, but lost at the same time—Separate trial, if required.

Where two bullocks belonging to two persons are lost at the same time, and are subsequently found in the possession of the accused, only one offence of theft can be deemed to have been committed by the accused in two separate trials, merely because the two bullocks found in his possession belonged to two separate owners. (*Mosely J.*)

NGA PO E vs. EMPEROR,

37 Cr.L.J. 530(1)—1936 Cr.C. 118=A.I.R. 1936 Rang. 94=162 I.C. 137

Sec. 75—Previous conviction—value of.

An old conviction proved about 13 years ago and a trifling fine of Rs. 10 cannot reasonably be used for the purpose of Sec 75 of the Penal Code. (*Khaja Mohamed Nur J.*)

ISHAR SINGH & ORS. vs. SHAMA DUSADH & ORS.

17 P.L.T. 627

Sec. 84—Accused pleading that he was possessed by evil spirit when committing a murder, if can claim the benefit of Sec. 84.

Where an accused charged with murder pleaded that at the time of committing the offences he was possessed by an evil spirit, which threatened her with death if she did not commit the murder *Held*, that under the circumstances the accused could not be given the benefit of Sec. 81, Penal Code, because it could not be said that at the time of the offence, the accused was of such unsound mind as to render her incapable of knowing the nature of the act or that what she was doing was wrong or contrary to law. (*Dhale & Agarwalla JJ.*)

MT. MT, SUKNI CHAMAIN vs. EMPEROR.

37 Cr.L.J. 543=1936 Cr.C. 285=A.I.R. 1936 Pat. 245=162 I.C. 25

Sec. 89—Husband beating wife for impertinence, if can claim benefit of Sec. 89.

Although a judge may have his own views regarding the right of a husband to beat his wife for impudence or impertinence.

Penal Code (Contd)

the law recognises no such general or unqualified right, and a husband accused of beating his wife cannot claim the benefit of Sec. 89 of the Penal Code. The beating of a wife is not *eo mine* one of the exceptions in the chapter of general Exceptions in the Penal Code. (*Pandrang Row & Menon JJ.*)

SUBBIA GOUNDAN, IN RE,

1936 M.W.N. 895=44 M.L.W. 348=
37 Cr.L.J. 1153=1946 Cr.C. 878=A.I.
R. 1936 Mad. 788=165 I.C. 339¹

Sec. 99—*Act done in good faith by constables under colour of their office but not strictly justifiable by law—Right of private defence, if exists.*

There is no right of private defence against an act done in good faith by an constable acting under colour of his office, even if his act is not strictly justifiable by law (*Niamatullah, J.*)

KAILAN BEG & ORS. vs. EMPEROR.

1936 A. W. R. 223=162 I. J. 339(2)=
37 Cr.L.J. 548=1936 A.L.J. 468=1936
C.C. 459=A.I.P. 1936 All 306.

Attachment of property resisted—One member of judgment-debtor's party killed—Offence committed.

A party going to attach the property of the judgment debtor in execution of a decree was resisted, and a fight resulted between the two parties in which several members of both parties received injuries and one member of the Judgment debtor's party was killed. *Held*, that the persons who went to effect the attachment were acting under the direction of a public servant in good faith, and even though the Act was not strictly justifiable by law, a sentence of one-full year's imprisonment for the accused who gave the fatal blow was sufficient. (*Skemp, J.*)

GHULAM & ORS. vs. THE CROWN.

38 P.L.R. 298=1936 Cr.C. 874=A.I.R.
1936 Lah. 851

Sec. 100—*Accused being struck on the head attacks with a knife causing death—right of private defence, if exceeded.*

Where on the facts of a case it was found that an attack by knife was made by the accused on a part of the body of the

Penal Code (Contd)

deceased when he himself was struck on the head and was bleeding, *held*, that the right of self-defence could not be said to be exceeded merely because the accused did not modulate his defence step by step according to the attack. (*Gracer J.*)

INZAR GUL KHAN vs. EMPEROR.

19 N.L.J. 135=I.L.R. 1936 Nag. 194=
165 I.C. 161(2)=37 Cr.L.J. 1070=1936
Cr.C. 1028=A.I.R. 1936 Nag. 234

Sec. 100—*Quarrel over a sum of money—death caused in fight—deceased aggressor—right of private defence, if can be pleaded.*

A quarrel having ensued between a debtor and creditor, over a paltry sum of money, the latter along with others came armed with lathis, and in the course of a free fight which ensued received fatal injuries. *Held*, that the creditor's party having been the aggressors in the fight, the debtor's party had the right of private defence of person and was therefore entitled to the benefit of Sec. 100, Penal Code. (*Nanavutty J.*)

RAM BILAS & ORS. EMPEROR.

1936 O.W.N. 255=160 I.C. 807=37 Cr.
L.J. 328=1936 Cr.C. 387=A.I.R. 1936
Oudh 231

Sec. 100—*Death caused in the course of an altercation—right of self defence.*

The deceased, a creditor of one of the accused asked for the return of his money and on being refused abused him. An altercation having ensued some of the relations of the deceased came out with lathis and other weapons and inflicted a wound on the debtor. Thereupon the other accused came out, and one of them inflicted a blow on the deceased which caused his immediate death. *Held*, that the party of the deceased having been armed, the accused had a right of self defence, and under the circumstances, it could not be said that right had been exceeded by them. (*Young C. & Monroe JJ.*)

SARDARA SINGH vs. THE CROWN.

38 P.L.R. 209

Secs. 100 & 103—*Accused causing death of a person in course of a free fight for retaining possession of a disputed land—offence.*

Penal Code (Contd.)

The complainant party having commenced to plough a land in the possession of the accused, a free fight ensued, in the course of which one of the complainant's party was killed. *Held*, that no liability could be fixed on the accused, for being in possession of the land for a long time, they were entitled to turn out the complainants who were undoubtedly the provoking party, out of the land. (*Young C. J. & Monroe JJ.*)

SARDARA & ORS. vs. THE CROWN.

38 P.L.R. 131

Secs. 100 & 103—*Deceased plucking mangoes from accused's trees—accused attacking with lathi—fight between the two resulting in death of the accused—right of private defence, if exceeded.*

The deceased who had been previously convicted of culpable homicide for having killed a relation of the accused, went to a grove belonging to the accused and began to pluck mangoes from the trees. The accused remonstrated, and a lathi fight ensued which ended in the death of the deceased. *Held*, that the deceased having previously killed a relation of the accused, it was quite possible that the accused suspected that he might also share the same fate, and so under the circumstances, the accused was entitled to the benefit of Sec 100, Penal Code. (*Nanavutty & Zia-ul Hassan J.*)

GAYA PRASAD vs. EMPEROR.

1936 O.W.N. 974 = 37 Cr. L. J. 1135 = 165 I.C. 264

Sec. 100—*Right of private defence—Attack on accused with dangerous weapons, by members of an unlawful assembly—Fatal injuries caused by accused on some members of the assembly—Offence, if protected by Sec. 100 I. P. C.*

The accused were confronted by an unlawful assembly with dangerous weapons and inflicted fatal injuries indiscriminately on some of the members who were not proved to have been actual assailants at the time when they received injuries.

Held, So long as the accused were confronted by an unlawful assembly they were entitled to deal with that assembly as a whole. If the assembly as a whole become dangerous to the accused, they were entitled to take all necessary measures for their own safety, and could not be expected to

Penal Code (Contd.)

judge accurately, the exact amount of force necessary for that purpose. The accused therefore could not collectively or individually be said to have exceeded their right of private defence. (*Agarwallah & Madan JJ.*)

RAMSAGAR GOPI vs. EMPEROR.

1636 Cr.C 1063 = A.I.R. 1936 Pat. 623

Secs. 100 & 103 *Deceased and party armed with lathis seeking forcibly to dispossess accused—right of private defence.*

The deceased along with others armed with lathis entered in to land which was in the lawful possession of the accused with the object of dispossessing them. The accused resisted and in the course of the fight the deceased received fatal injuries. *Held*, that as the deceased and his party were so armed as to raise a reasonable apprehension in the minds of the accused that they would be killed if they did not offer resistance, the accused were all entitled to the benefit of the right of private defence of person and property. (*Nanavutty J.*)

RAMESHWAR vs. EMPEROR.

1936 O.W.N. 934 = 1936 Cr. C. 984 = A.I.R. 1936 Oudh 575 = 164 I.C. 426

Secs. 100 & 103—*Deceased attempting to rescue cattle from being taken to pound by accused—lathi fight ensuing extent of private defence of property.*

The accused and others were driving the cattle belonging to the deceased which had strayed into their lands, wards the pound, when the deceased with his men appeared on the scene, armed with lathis. There was a free fight between the parties in the course of which the deceased received fatal injuries. *Held*, that the accused had a right to rescue cattle, which had strayed into his land to the pound, but that right did not extend to the causing of death, and in the circumstances of the case, the accused had clearly exceeded the right of private defence of person and property. (*Nanavutty J.*)

SANKER BAKSH SINGH vs. EMPEROR.

1936 O.W.N. 766 = 37 Cr.L.J. 931 = 164 I.C. 151

Secs. 107, 120A & 120B *Criminal conspiracy amounting to abetment*

Penal Code (Contd)

Separate charge under Secs. 120A & 120B, need if be framed.

When a criminal conspiracy amounts to an abetment under Sec. 107 I. P. C., it is not necessary to invoke the provisions of Secs. 120A & 120B, because specific provisions are to be found in Secs 109, 114, 115 and 116, Penal Code for the punishment of abetment. Therefore when a charge has been framed under Sec. 109, no separate charge need be framed under Sec. 120B of the Code (*Dhaval & Rowland JJ.*)

JUGESHWAR SINGH vs. EMPEROR.

15 Pat. 26=17 P.L.T. 234=37 Cr.L.J. 893=1936 Cr.C. 539=A.I.R. 1936 Pat. 346=164 I.C. 86

Sec. 111 Abetment—abettor when liable for the commission of a different act than the one he instigated.

Under Sec. 111. of the Penal Code, an abettor may be liable for the commission of a different act than the one he instigated, provided the different act was a probable consequence of the abetment and committed under the influence of the instigation. A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such act; an unusual or unexpected consequence cannot be described as a probable one. When the act done is different from the act instigated, an abettor is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation. (*Harries & Bachpal JJ.*)

EMPEROR vs. GIRJA PRASAD & ORS.

57 All. 717=1935 A.W.R. 64=1935 A.L.J. 54=1935 Cr.C. 413=36 Cr.L.J. 338=A.I.R. 1935 All. 346,2)=153 I.C. 999

Sec. 120A—Conspiracy—Express proof of concert and agreement—if essential.

Even in the absence of express proof of concert and agreement, conspiracy may be inferred from acts and conduct such as performance of different parts of the act by different accused in pursuit

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Penal Code (Contd)

of the same object. (*Lort-Williams & Nassim Ali JJ.*)

EMPEROR vs. BENOYENDRA CHANDRA PANDEY & ANR.

63 Cal. 929=64 C.L.J. 154=40 C.W.N. 432=37 Cr. L. J. 391=1936 Cr.C. 145=A.I.R. 1936 Cal. 73

Sec. 120-A—Conspiracy—what it means—when all persons not in agreement, conspiracy not proved.

In order to constitute the offence of conspiracy as defined in Sec. 120-A, it is only necessary for the prosecution to show that the persons concerned had agreed to do or cause to be done an illegal act, or an act which is not illegal by illegal means. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. (*Derbyshire C. J. & Costello J.*)

RASHBEHARY vs. EMPEROR.

1936 Cr.C. 1043=A.I.R. 1936 Cal. 753

Sec. 120-A & B.—Persons charged with the conspiracy for subversion of British Empire—Persons who had knowledge of crime but did not take part to prevent crime if included in conspiracy.

For the purpose of establishing a charge of conspiracy for the sub-version of the British Empire, evidence has to be taken into consideration of persons who may have knowledge of secret organisations, but who have not taken part in the perpetration of a crime i.e., to whom no overt acts can be attributed. Persons who happen to be cognisant of the crime, but have made no attempt to prevent it or disclose its commission cannot be treated as members of the conspiracy. (*Guha & Bartley JJ.*)

NARAIN CH. BISWAS vs. EMPEROR.

63 C.L.J. 334=1936 Cr.C. 200(2)=37 Cr.L.J. 445=161 I.C. 289=A.I.R. 1936 Cal. 106

Sec. 120-A—Gist of the offence.

The gist of the offence under Sec. 120-B consists in agreement to commit an offence. Each and every conspirator may not be aware of each and every act of each other, but may be alike guilty of conspiracy which may be proved by

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certain overt acts. (*Gruer J.*)

MAHAMMAD ISMAIL vs. EMPEROR.

I.L.R. 1936 Nag. 152 = 1936 Cr.C. 561
= A.I.R. 1936 Nag. 97 = 165 I.C. 913

Sec. 120-B—*Necessity for proving one large conspiracy when several persons are charged with same conspiracy.*

In a charge of conspiracy brought against several persons, the prosecution must prove that there is one large conspiracy involving all the persons charged and not a number of unrelated conspiracies entered into by different groups of the accused. Unity of will and purpose amongst all the accused must be proved. Any accused not shown to be a member of that large conspiracy is entitled to demand an acquittal, however bad his record may be and however much he may be suspected of this or that offence. (*Gruer J.*)

MAHAMMED ISMAIL vs. EMPEROR.

I.L.R. 1936 Nag. 152 = 1936 Cr. C 561
= A.I.R. 1936 Nag. 97 = 165 I.C. 913

Sec. 120-B—*Conviction for specific offence in previous trial—evidence in such trial, if can be used to prove conspiracy.*

Where the accused had been tried previously for a specific offence and acquitted, the acquittal is conclusive and the same evidence cannot be brought up against him in a subsequent trial to prove conspiracy. But when the previous trial ended in a conviction, the evidence which was used against the accused may be employed to prove conspiracy. (*Gruer J.*)

MAHAMMED ISMAIL & ORS. vs. EMPEROR.

I.L.R. 1936 Nag. 152 = 1936 Cr.C. 561
= A.I.R. 1936 Nag. 97 = 165 I.C. 913

Secs. 120-B & 417—*Charge of cheating in pursuance of a conspiracy—conspiracy not established—accused, if can be convicted of cheating.*

Where the accused were charged with cheating in pursuance of a conspiracy, and the evidence showed that an offence of cheating was committed, but the conspiracy was not proved, held that the accused could be convicted of the offence of cheating only. (*Tyabji J.*)

EMPEROR vs. ABDUL RAHIMAN AKR-ASUDDIN & ANR.

Penal Code (Contd)

66 Bom. 485 = 36 Cr.L.J. 753 = 38 Bom. L.R. 153 = 1936 Cr.C. 573 = A.I.R. 1936 Bom. 193

Sec. 124-A—*Disaffection—Meaning of—bringing into hatred and exciting disaffection, if to be considered conjunctively.*

In considering a charge under Sec. 124-A, the case of bringing into hatred or contempt and that of exciting disaffection have to be considered together, the one resulting from the other. Disaffection is a positive political distemper having the form of either defiant insubordination of authority or secret attempt to alienate the people therefrom. 22 Bom 152 followed. (*Guho & Lodge JJ.*)

SACHIN DAS vs. EMPEROR.

63 Cal. 588 = 40 C.W.N. 607 = 1936 Cr. C. 748 = 37 Cr. L. J. 1077 = 164 I. C. 1071 = A.I.R. 1936 Cal. 524

Sec. 124-A—*Two voices in same speech—Harmless one if may be pleaded as expressing real intention.*

If a man speaks in the same speech with two different voices one of which brings him under the mischief of the Criminal Law, it is no defence to say that the other voice expresses his real views 22 Bom. 152 followed. (*Guho & Lodge JJ.*)

SACHIN DAS vs. EMPEROR.

63 Cal. 588 = 40 C.W.N. 607 = 37 Cr.L. J. 1077 = 1936 Cr.C. 748 = 164 I.C. 1071 = A.I.R. 1936 Cal. 524.

Sec. 124-A—*Intention to produce effect hit by section, when established.*

If on reading through a speech the only probable and reasonable effect on the minds of those to whom the speech was addressed appears to be that the feelings mentioned in Sec. 124A. I, P. O. would be excited, the speaker must be held to have intended to produce that effect. (*Guho & Lodge JJ.*)

SACHIN DAS vs. EMPEROR.

63 Cal. 588 = 40 C.W.N. 607 = 37 Cr.L.J. 1077 = 164 I.C. 1071 = 1936 Cr.C. 748 = A.I.R. 1936 Cal. 527

Secs. 143 & 424—*Person put in possession of field by Court, taking away paddy from the same, if can be convicted.*

A person who has been put into possession of the paddy field by the Court under

Penal Code (Contd)

Or. 21 r. 95 C. P. Code is entitled to cut the crop standing on the field, and if he has done so, he cannot be proceeded against under Secs. 143 & 427 Penal Code. (Jack J.)

ARMAN SHAIK vs. NIAMUDDIN SHAIKH.
1936 Cr. C. 302=37 Cr. L. J. 524=
161 I. C. 974=A, I.R. 1936 Cal. 197

Sec. 145—*All members of unlawful assembly if guilty of same offence as principal offender.*

In construing Sec. 149 I. P. C. the question arises whether a member of an unlawful assembly is guilty necessarily of the same offence as the principal offender or whether it must be determined with reference to the fact of the case, what offence the member must have known to be likely to be committed and whether if such offence is a minor offence he should be convicted accordingly. This latter construction is more in accordance with the intention of the legislature on a reading of the words of the section. The principles of Sec. 38 & 110 applies to offences under Sec. 149 and the liability of an individual member of an unlawful assembly depends on the intention or knowledge of the member. 4 P. L. T. 913 distinguished. (Varma & Rowland JJ.)

BHAGWAT SINGH vs. EMPEROR.

17 P.L.T. 650=162 I. C. 563=37 Cr.L.J. 630=1936 Cr.C. 798=A.I.R. 1936 Pat. 481

Secs. 147 & 109—*Accused charged with abetment of the offence of rioting by using words of instigation—No evidence of words actually used—conviction, if proper.*

The accused was charged with the offence of abetting rioting by using words which instigated the rioting. No evidence was available as to the words actually used.

Held, in the absence of any definite reliable evidence as to the exact words used by him, it is not safe to convict him for abetment of the offence. (Varma J.)

RAI HARI PRASAD vs. EMPEROR.

165 I.C. 952=A.I.R. 1936 Pat 608=
1936 Cr.C. 1074

Secs. 147 & 304—*Accused driving deceased's cattle which had strayed into his*

Penal Code (Contd)

land, to the pound—attempt to rescue by deceased—lathi fight resulting in death of deceased—offence committed.

The deceased along with other were grazing their cattle on land belonging to the accused, and thereupon the accused, armed with this began to drive the cattle away toward the pounds. The deceased having resisted, there ensued a lathi fight between the parties, in the course of which the deceased received fatal injuries. Held that although the accused had a right to drive cattle that had strayed into his land, that right did not extend to the causing of death, and the accused had exceeded the right of private defence of persons and property and was guilty under Secs. 147 & 304, Penal Code. (Nanavutty J.)

SHANKAR BAKSH SINGH vs. EMPEROR.

1936 O.W.N. 766=164 I.C. 151=37 Cr.L.J.931.

Secs. 147 & 323—*Rioting over possession of land—proper common object to be charged—common object of assaulting, if may be added to that of taking possession, when there is no evidence of independent existence of former.*

Where in a case of alleged rioting the prosecution case is that the accused tried to take forcible possession of a piece of land which was in the complainant's possession, the proper common object to be charged is that of taking possession of the disputed land. Simply because certain persons were injured, it is altogether wrong to include an alternative or additional common object of assault at the same trial even more so in one charge where there is no evidence of an independent common object of assaulting. (Cunliffe & Henderson JJ.)

ALKAS ULLA & ORS. vs. EMPEROR.

40 C.W.N. 1409

Secs. 149, 38 & 110—*Principle of Secs. 38 & 110 applies to offences under Sec. 149.*

The principle of Secs. 38 & 110 applies to offences under Sec. 149 and the liability of individual members of an unlawful

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assembly depends on the intention or knowledge of the members. (*Varma & Rowland JJ.*)

BHAGWAT SINGH vs. EMPEROR.

17 P.L.T. 481=1936 Cr.C. 798=37 Cr. L.J. 630=162 I.C. 563=A.I.R. 1936 Pat. 481

Sec. 153—Order by Police Officer under Sec. 31, Police Act, directing certain persons to get down from palanquins—Disobedience, if an offence.

Sec. 153, Penal Code does not apply unless there has been a "doing anything which is illegal". The act of going through a village on conveyances being in itself a perfectly legal act and the order of the police officer under Sec. 31, Police Act, directing certain persons to get down from the palanquins in which they are being carried through inhabited parts of certain hill villages being without power, the failure to obey the order does not amount to an illegal act within the meaning of Sec. 153, Penal Code. (*Sulaiman C. J. & Bennet J.*)

JASNA MI & ORS. vs. EMPEROR.

1936 A.W.R. 424=163 I.C. 866=37 Cr. L.J. 866=1936 A.L.J. 579=1936 Cr.C. 686=A.I.R. 1936 All. 534

Sec. 153(a)—Intention of writer to promote hatred, if necessary ingredient for an offence under the section.

In a prosecution under Sec. 153 (a) Penal Code, it is not necessary for the prosecution to promote hatred, etc. The legislature contemplates that the words spoken or written which do promote hatred etc., would create sufficient mischief, so as to fall within the scope of the section (*Sulaiman, C. J. Thom & Niamatullah, JJ.*)

M.L. C. GUPTA vs. EMPEROR.

1936 A.W.R. 227=1936 A.L.J. 165=1936 Cr.C. 480=37 Cr.L.J. 599=162 I.C. 507=A.I.R. 1936 All. 314

Sec. 161—Charge under the section—position of the principal witnesses for the prosecution.

In a charge under Sec. 161 Penal Code, the principal witnesses for the prosecution are necessarily guilty of the abetment of the offence with which the accused

Penal Code (Contd)

person is charged and their evidence must be put on the footing of the evidence of an accomplice. (*Nanavutty J.*)

JAGADISH PRASAD vs. EMPEROR.

1936 O.W.N. 829=164 I.C. 428(2)=37 Cr.L.J. 951=1936 Cr.C. 1084=A.I.R. 1936 Oudh 401

Sec. 171-G—General charges of misconduct not punishable under Sec. 171-G—Statements of fact are only punishable.

General charges of misconduct are not statements of fact within the meaning of Sec. 171-G.

Statement that a candidate would take no part in proceedings of the panchayat except to nod his head and hold up his hand, is not a statement of fact relating to the conduct or character of the accused.

Statement that the candidate removed the names of those who did not vote for him at the previous election is general imputation of misconduct unaccompanied by any charge of particular acts. (*Stodart J.*)

NARAYAN SWAMI vs. MUDALIAR.

1935 M.W.N. 1164=37 Cr.L.J. 629=1936 Cr.C. 303=162 I.C. 494=A.I.R. 1936 Mad. 316

Sec. 171-G—Pamphlets at election containing defamatory statements about person not a candidate—Prosecution, if requires previous sanction.

It is only in case of prosecution for a false statement in relation to the personal character or conduct of a candidate at an election that previous sanction is necessary. It does not apply to defamatory statements made about persons who are not candidates. (*Stodart J.*)

NARAYAN SWAMI NAICKER vs. DEVARAJA MUDALIAR.

1935 M.W.N. 1164=37 Cr.L.J. 629=1936 Cr.C. 303=162 I.C. 394=A.I.R. 1936 Mad. 316

Sec. 172—Provisions of the section, when applicable

Sec. 172, Penal Code can apply only if a summons, notice or an order is to be served on the accused who absconds with a view to evade the service of such summons, notice or order and it is not applicable unless summons, notice or order which is to

Penal Code (Contd.)

be served on the accused is in fact, in existence and capable of being served. (*Niamatullah, J.*)

ABDUL JALIL KHAN vs. EMPEROR.

1936 A.W.R. 216=1936 A.L.J. 373=37 Cr.L.J. 713=162 I.C. 755=A.I.R. 1936 All. 354

Sec. 177—*Village headman supplying false information of a death which had not in fact occurred, if guilty of offence under the section.*

A village headman signed a panchayatnama to the effect that a girl had died by having been drowned in a river. The panchayatnama was sent to the Police and was believed by them to be true. It was later ascertained that the information was absolutely false and that the girl was alive and she had in fact eloped with the village headman. The village headman was thereupon prosecuted under Sec. 177, Penal Code, for supplying false information to the police. Held, that as none of the events enumerated in cl. (d) of Sec. 45, Cr. P. Code, had happened, it could not be said that the accused was "legally bound" to give any information to the police and that the false information which he gave to the police, did not bring his case within the four corners of Sec. 177, Penal Code, (*Sulaiman C. J. & Rachpal Singh J. Bennet J. Dissenting.*)

LAKHAN vs. EMPEROR.

1936 A.W.R. 905=165 I.C. 769=1936 A.L.J. 1064=1936 Cr.C. 1011=A.I.R. 1936 All. 788

Sec. 182—*Offence of making false report—Report, if must be about cognisable crime.*

In a prosecution under Sec. 182, Penal Code for making a false report, it is not necessary that the report should have been of a cognisable crime. The question in such a case is not whether the report was of a cognisable crime, but whether it was of such a nature as might be supposed to lead the police to make use of their lawful powers to the injury or annoyance of any person. (*Allsop J.*)

FARIDUDDIN KHAN vs. EMPEROR.

1936 A.W.R. 273=1936 A.L.J. 253=162 I.C. 338=37 Cr.L.J. 562(1)=1936 Cr.C. 479=A.I.R. 1936 All. 313

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Sec. 182—*Prosecution for lodging false information—Offence when constituted.*

Sec. 182, Penal Code is for the prosecution of a person who gives any information which he knows or believes to be false, to a public servant. The offence is complete as soon as the information is given. Whether the public servant omits to take a statement subsequently on oath of the person giving the information for the purpose of taking certain action on it is a matter which will not affect the giving of the information. (*Bennet, J.*)

DALPAT RAI vs. EMPEROR.

1936 A.W.R. 396=1936 A.L.J. 592=1936 Cr.C. 614=37 Cr.L.J. 857=163 I.C. 609=A.I.R. 1936 All. 469

Sec. 182—*Information found to be false given by letter posted at one place and delivered at another—place where offence triable.*

Where the false information given to a public servant, which is made the basis of a prosecution, was given by letter posted at one place and delivered at another, the offence is committed partly in one place and partly in another, and the Court at the place where the letter was written and posted has jurisdiction to try the case. Even if that court is considered to have no jurisdiction, Sec. 531, Cr. P. Code will cover the case, (*Niamatullah & Allsopp JJ.*)

EMPEROR vs. NARAIN DAS.

159 I.C. 808,

Secs. 182 & 211—*Information to police given by village Munsiff that wife of complainant was beaten to death—Enquiry by police and report that death was due to natural causes—complaint filed against village Munsiff for having given false information—Proceedings taken under Sec. 211 I.P.C. and not under Sec. 182 I.P.C.—Written complaint of police if necessary.*

The wife of S died on the 25th September 1935. Information was given to the village Munsiff that death was due to beating by her husband and the Munsiff gave information to the Police to that effect. The result of the police

Penal Code (Contd)

investigation was that death was due to natural causes, and the complaint was not true. The Magistrate who had taken the complaint under Sec. 182 I. P. C., on receipt of the police report proceeded under Sec. 211 I. P. C. The accused raised a preliminary objection that the complaint could not be entertained except upon a written complaint of the Sub-Inspector of Police.

Held, the facts of the case disclosed an offence under Sec. 211 I. P. C., a complaint under which section could be filed by a private person without police intervention. 62 M. L. J. 735 ; 55 Mad 343 relied on (*King J.*)

MATHUVELU KUDUMBARAN & ANR. vs. SAMIYYA KUDUMBARAN,

59 Mad. 1083=71 M.L.J. 483=1936 M.W.N. 641=44 M.L.W. 6313=7 Cr.L.J. 1134=165 I.C. 232

Sec. 183—Tandel of a ship resisting seizure of goods on board for refusal to pay octroi Right to levy octroi not proved—Tandel if guilty under Sec. 183.

The tandel of a ship arrived at the port of Jaitapur carrying goods consigned to various persons in Jaitapur and in Rajapur. Octroi was duly paid in respect of goods consigned to Jaitapur traders in accordance with rules made by the local board. The Naker of the Jaitapur Naka however demanded octroi for goods proposed to be taken to the port of Rajapur and on the Tandel refusing to pay, seized part of the cargo, which however the Tandel took away.

The action of the Naker proceeded under rules made by the Local Board and not under the bye-laws which had the force of law.

Held in the absence of definite proof that the Naker had lawful authority to board the applicant's ship and seize the goods he was carrying, the action of the tandel in taking away goods seized by him could not be said to be a resistance to the taking of property by the lawful authority of a public servant, and no offence was committed. (*Broomfield & Wassodew JJ.*)

DEMA MOHADU vs. EMPEROR.

38 Bom. L.R. 790=1936 Cr.C. 921=165 I.C. 637 A.I.R. 1936 Bom. 376

Penal Code (Contd)

Sec. 186 —'Obstruction'—meaning of.

By obstruction in Sec. 186 is meant physical obstruction. (*Gruer J.*)

EMPEROR vs. BABULAL MUNNILAL,

I.L.R. 1936 Nag. 50=19 N.L.J. 120=1336 Cr.C. 551=37 Cr.L.J. 587=162 I.L. 308=A.I.R. 1936 Nag. 86

Sec. 188—Essentials—Right to go through a village on conveyance—Order by police-officers directing certain persons to get down from palanquins—Disobeyance, if an offence.

Sec. 153 does not apply unless there has been "doing anything which is illegal." The act of going through a village on conveyance being in itself a perfectly legal act and the order of the police officer directing certain persons to get down from palanquins in which they are being carried through inhabited parts of certain hill villages being without power, the failure to obey the order does not amount to an illegal act within the meaning of Sec. 153. (*Sulaiman C. J. & Bennett JJ.*)

JASNAMI vs. EMPEROR.

1936 A.L.J. 579=1936 A.W.R. 424=1936 Cr.C. 686=37 Cr.L.J. 866=163 I.C. 866=A.I.R. 1936 All. 34

Secs. 189 & 433—Offence under Sec. 189—essentials.

It is of the essence of an offence under Sec. 189, Penal Code that the threat or injury should have been held out for the purpose of inducing a public servant to do any act or to forbear or delay the doing of an act. The mere threat uttered as an exhibition of bad temper or in the course of an altercation, may amount to an offence under Sec. 503, Penal Code, but is not necessarily an offence under Sec. 189. (*Niamatulla J.J.*)

MAHAMMAD HAMID KHAN vs. EMPEROR.

1936 A. L. J. 195=1936 A. W. R. 28=A.I.R. 1936 All. 171=160 I.C. 17=1936 Cr.C. 191=37 Cr.L.J. 212

Secs. 192 & 102—Judicial proceeding referred to in the section, if must be some proceeding actually contemplated.

In order that the making of a false entry may come within the ambit of section

Penal Code (Contd.)

192, Penal Code, it must be proved that the entry was made with the intention of its being used in some judicial proceeding actually contemplated, not merely that the accused had an idea in his mind that the document might at some future date be used in some proceeding, and further that the entry would be material to the result of such judicial proceeding. (*Lort Williams & Jack J.J.*)

UPENDRA NATH CHATTERJEE vs. EMPEROR.

40 C.W.N. 313.

Sec. 193—*Prosecution witnesses giving a different version in the Sessions Court from what they gave in the committing Magistrate's Court, if liable to be prosecuted.*

It is in the interests of the Crown as well as in the interest of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the committing Magistrate. Therefore the mere fact that a prosecution witness gives evidence in the Sessions Court which is at variance with the evidence given by him in the committing Magistrate's Court, and such evidence results, in the acquittal of the accused is no good reason for launching a prosecution against him on a charge of perjury. (*Nanavuty J.*)

PRAGI & ANR. vs. EMPEROR.

1936 O.W.N. 763 = 164 I.C. 107

Sec. 193—*Hearsay statement, if can be made subject of prosecution under the section.*

A hearsay statement recorded by a Magistrate while recording the deposition of a witness not being justified by law, it cannot be made the subject of prosecution under Sec. 193, Penal Code. (*Agha Haidar J.*)

JODPA vs. THE CROWN.

38 P.L.R. 16 = 1936 Cr.C. 796 = 37 Cr. L.J. 1043 = 164 I.C. 1057 = A.I.R. 1936 Lah. 828

Sec. 199—*False statements in insolvency petition if constitutes offence under—*

Statements in a petition of insolvency are very analogous to statements made in

Penal Code (Contd.)

ordinary civil pleadings, statements which are verified by law on the part of the persons who places them on record. They do not constitute evidence which is bound to be accepted by the court, and hence there is no offence under Sec. 199 I. P. C. (*Cunliffe & Henderson. J.J.*)

CHOTERAM vs. EMPEROR.

1936 Cr.C. 1137 = A.I.R. 1936 Cal. 801

Sec. 199—*Repetition of statement of another in an affidavit—offence committed*

Where a charge under Sec. 199 of the Penal Code, against a person referred to an affidavit sworn by him in which he only repeated what another person had written on the notice as a servant of a third person held, that such repetition did not amount to the swearing of a false affidavit. (*Varma, J.*)

KUTUBUDDIN & ORS. vs. EMPEROR.

17 P.L.T. 692

Secs. 201, 325—*Accused who commits an offence and then conceals evidence can be convicted both of the offence and of concealing the evidence.*

Sec. 201 I. P. C. makes it punishable to remove evidence of the commission of a crime and it is nowhere said either in the Indian Penal Code or in the Code of Criminal Procedure that a man who commits an offence, say of murder and then conceals, the evidence cannot be convicted, both of the murder and of concealing the evidence (*Allsop J.*)

AJOG NANAIN vs. EMPEROR.

1936 A.L.J. 1310 = 1936 A.W.R. 1040

Sec. 205—*Accused falsely representing himself as a servant of a certain person, receiving a Civil Court notice on behalf of that person—offence committed.*

Where the accused falsely representing himself to be a certain person, received a notice under Sec. 158B, B. T. Act, meant for that person, and the accused was thereupon tried and convicted under Sec. 205, Penal Code, held, that the conviction could not be sustained, because the act of the accused could not be said to amount to false personation of another, within the meaning of Sec. 205, Penal Code (*Varma J.*)

Penal Code (Contd.)

QUTUBUDDIN & ORS. vs. EMPEROR,
17 P.L.T. 692

Sec. 209—*Essentials for constituting offence under the section.*

Before a person can be convicted under Sec. 209, Penal Code, it has to be established that his conduct was fraudulent or dishonest, or that he acted with intent to injure or annoy any person. The question of fraud or dishonesty or intent to injure or annoy must be decided like any other question of fact on the evidence. (*Allsop J.*)

MOTILAL vs. EMPEROR.

1935 A.L.J. 71 = 1936 A.W.R. 161 = 161 I.C. 314 = 37 Cr.L.J. 420 = 1936 Cr.C. 186 = A.I.R. 1936 All 164

Sec. 211—*Mere fact of giving evidence, if amounts to institution of proceedings.*

The mere fact of giving evidence, cannot by any stretch of reasoning, be tantamount to the institution of proceedings within the meaning of Sec. 211, Penal Code, and a witness giving evidence is not liable to prosecution under that section. (*Agha Haidar J.*)

JODPA vs. THE CROWN.

38 P.L.R. 16 = 27 Cr.L.J. 1043 = 1936 Cr.C. 796 = 164 I.C. 1057 = A.I.R. 1936 Lah. 828

Sec. 211—*Delay in filing complaint under Sec. 211—if a ground for its dismissal.*

In charges under Sec. 211, Penal Code, great delay should not be tolerated, and such delay alone is a sufficiently good reason for refusing to proceed with the complaint, for it is not in the public interest that persons should be allowed to come forward after a very long delay after an alleged false charge has been made, and to require the Court to enquire into the matter. (*Mackney J.*)

MURUGAPPA CHETTAAR vs. K. P. R. M. GHETTYAR.

A.I.R. 1935 Rang. 485 = 160 I.C. 150 = 1935 Cr.C. 1259

Sec. 211—*Accused giving false report to two officers at different places offence under Sec. 211—where committed,*

Penal Code (Contd.)

The accused laid information of certain offence before the A. S. I. at Mokameh and confirmed the same before the A. S. I. of Sarmera. The information however turned out to be false. *Held*, the offence of giving false evidence was partly committed at Mokameh and partly at Sarmera. (*Varma & Rowland JJ.*)

NANKU vs. EMPEROR.

17 P.L.T. 472 = A.I.R. 1936 Pat. 358 = 163 I.C. 805 = 1936 Cr.C. 558 = 37 Cr.L.J. 862

Sec. 211—*False statement made to police-officer after complaint is a statement in course of police investigation—person making such statement if liable to prosecution.*

A statement made to a police officer by an accused after a complaint has been received is a statement made in police investigation, and cannot be made the foundation of a prosecution. 2: M. L. J. 1232 followed (*King J.*)

PATIL SUBBA REDDI vs. EMPEROR.

1935 M.W.N. 1197 = 43 M.L.W. 261 = 37 Cr.L.J. 357 = 1936 Cr.C. 163 = A.I.R. 1936 Mad 160 = 160 I.C. 988

Sec. 211—*Essential ingredients of the offence.*

In order to prove an offence under Sec. 211 I. P. C. it will be necessary for the prosecution to establish first that the prosecution brought by the accused was brought with intent to cause injury to the complainant, secondly, the charge made against the complainant was false and thirdly, that it was made with the knowledge on the part of the accused that there was no just or lawful ground for such charge (*Dunkley J.*)

U. PO. THEIN vs. BUTA KUAN;

1936 Cr.C. 963 = A.I.R. 1936 Rang. 473

Secs. 211 & 500—*False report to police by a woman that the accused, a malguzar had insulted her modesty—Complaint by malguzar under Sec. 500 I.P.C.—Right of woman to insist complaint under Sec. 211 I.P.C.*

The accused in a report to the police station alleged that the malguzar had told his servants to insult her modesty.

Penal Code (Contd.)

The complaint however was dismissed, when the malguzar brought a case under Sec. 500 I. P. C. The accused contended the case was one under Sec. 211 I. P. C.

Held the Court is not justified in refusing process for defamation merely because a statement may also disclose the commission of an offence under Sec. 182 or 211 I. P. C. The accused cannot be heard to say that she prefers the more serious section because the procedure under it, would be more favourable to her, (*Gruar J.*)

MT. BINIA PARAN LODHI vs. EMPEROR.

1936 Cr.C. 1035 = A.I.R. 1936 Nag. 241.

Sec. 221—Murder in presence of police constable—police constable intentionally omitting to apprehend murderer—offence.

A police constable is a public servant within the meaning of Sec. 231, Penal Code and if a police constable, in whose presence a murder is committed, intentionally omits to apprehend the murderer he is guilty of an offence under Sec. 221 even though his motive may not have been that he wanted the murderer to escape but that he was afraid of getting hurt. (*Allsop J.*)

RAM LAL & ORS. vs. EMPEROR.

1936 A.W.R. 819 = 1936 A.L.J. 1006 = 164 I. C. 702 = 37 Cr. L. J. 1019 = 1936 Cr.C. 791 = A.I.R. 1936 All. 651

Secs. 224 & 225—Police officer arresting accused in exercise of general powers under Sec. 54, Cl. (1) thirdly Cr. P. C.—Proclamation not proved—arrest if legal—Escape and rescue from custody of such police officer if an offence.

A prosecution was pending against the accused for an alleged offence under Sec. 196 I. P. C. and a warrant of arrest had been issued against him on his failure to appear in response to a summons. He was arrested by a police constable who had not the warrant with him, and escaped from his custody. He was prosecuted on a charge under Sec. 224 & 225 I. P. C. on the strength of Sec. 54, cl. (1) thirdly Cr. P. C. on the ground that a proclamation had issued and had been duly served. The prosecution however could not prove the service.

Penal Code (Contd.)

Held in the absence of any proof of the proper service of the proclamation, the accused could not be convicted for an offence of having escaped from lawful custody. (*Rowland J.*)

RAGHUNI PROSAD MAHTO vs. EMPEROR.

17 P. L. T. 81 = 1936 Cr. C. 273 = 37 Cr. L. J. 318 = 160 I. C. 604 = A. I. R. 1936 Pat. 249.

Secs. 240 & 241—Essential ingredient of offence under Sec. 240 I. P. C.—conviction under Sec. 241, when facts found to fulfil requirements—proper sentence.

The accused was convicted under Sec. 240 I. P. C. for delivering four counterfeit coins of the King's Coin.

Held, the conviction could not be sustained unless there was evidence that the accused had knowledge of the coins being counterfeit, at the time when he became possessor of them. The Court can alter a conviction from Sec. 250 to 241 I. P. C. when the facts warrant it. A sentence of six months rigorous imprisonment is not at all excessive. (*Bose J.*)

DOST MAHAMMAD vs. EMPEROR.

1936 Cr.C. 1036 = A.I.R. 1936 Nag. 242.

Secs. 243.—Incriminating articles found in house occupied by accused with other persons—conviction of accused, when justified.

No person of a house shall be convicted of being in possession of stolen property or counterfeit coin or anything of that kind, if there happen to be other people living in the house and if it cannot be positively established that the person convicted had put the incriminating articles in the place where they were found. (*Allsop J.*)

TULSI RAM vs. EMPEROR.

1936 A. L. J. 508 = 1936 A. W. R. 456 = 1936 Cr.C. 790 = 37 Cr. L. J. 551 = 162 I. C. 295 = A.I.R. 1936 All. 650.

Sec. 243.—Accused in possession of counterfeit coins—coins purchased at Court auction sale—no attempt by accused to pass them as genuine—offence under the section if proved.

Penal Code (Contd)

The accused was charged with the offence of having counterfeit coins in his possession. The accused pleaded that the coins were part of an estate which he had purchased at a court auction sale. It was not shown that any attempt had been made by the accused to pass the coins to other person as genuine. *Held* that under the circumstances it could not be said that the accused was in possession of the coins fraudulently or with intent that fraud may be committed, and therefore he could not be convicted of an offence under Sec. 243, Penal Code (*Varma J.*)

GUDER SAO vs. EMPEROR,

17 P.L.T. 648 = 37 Cr. L.J. 1154 = 1936 Cr. C. 898 (2) = A.I.R. 1936 Pat. 533 = 185 I.C. 603.

Sec 268 & 923—Owner of shop erecting platform encroaching on public road and letting them out—Liability for causing public nuisance.

Where the owners of certain shops build certain platforms in front of them to enable the shopkeepers to sit on them for selling their goods, and these platforms encroach on the public road, and amount to public nuisance within the meaning of Sec. 268, Penal Code, the owners who built the platforms are guilty of the act which *ex-hypothesi* amounts to public nuisance, and not the lessees who merely hire the shops and sit on the platforms. (*Niamatullah J.*)

PURNAMASHI vs. EMPEROR.

1936 A. L. J. 200 = 1936 A. W. R. 194 = 180 I.C. 269 = 37 Cr. L. J. 269 = 1936 Cr. C. 1936 = A.I.R. 1936 All. 156.

Sec. 294-A—Kuri fund—if a lottery—Promoters of lottery are personally liable—Subscribers have no liability.

Defendants promoted a kuri fund for the purpose of raising funds for a temple. The scheme was that the kuri was to be conducted for 50 months, and that those subscribers who had not drawn a prize were to be refunded the amount of the money subscribed by them. The plaintiffs who had contributed Rs. 270 in 45 instalment did not draw a prize, when the kuri came to an end after payment of 45 instalments. The defendants contended that the agreement between the parties, being in respect of a lottery unauthorised by Government was

Penal Code (Contd)

far an illegal object, and was therefore unenforceable at law.

Held, the kuri was clearly within the definition of a lottery. It is not necessary in the case of a lottery that a loss to some of the parties is essential. Nor does it make any difference when the prize is paid from the interest earned on subscriptions, and not from the subscriptions direct. But a lottery is not unlawful in British India in the sense that it is prohibited by law. The offence lies in the owner or occupier of a place keeping it for the purpose. In other words the law is directed against the persons who promote lotteries and not against persons who are tempted to take tickets in lotteries. (*Cornish, Varadachariar, Wadsworth & Lakshmana Rao JJ; Venkataramana Rao J. Contra.*)

SESHA AYYAR vs. KRISHNA AYYAR,

59 Mad. 562 = 70 M. L. J. 36 = 1939 M. W. N. 89 = 43 M.L.W. 77 = 162 I. C. 68 = A.I.R. 1936 Mad. 225.

Sec. 298—Accused slaughtering a cow in full view of houses of Hindus—Offence.

Sec. 298, I. P. C. includes any action which is known to wound the religious feelings of others. Accordingly, where a person slaughters a cow in broad daylight in full view of the houses of Hindus, he is guilty of an offence under Sec. 298 I. P. C., even though he had no desire to wound the feeling of any person. (*Allsopp J.*)

MIR CHITTAN vs. EMPEROR.

1936 A. L. J. 1197 = 1936 A.W.R. 1024.

Sec. 299, Exp. 2—Death caused from gangrene as result of injuries caused by accused—Offence.

The deceased did not actually die from the injuries caused by the accused, but died from the gangrene which set in consequence of some dirty substance such as a bandage or the *da* with which the injuries were caused, coming into contact with one injury.

Held, although the injuries were not the direct cause of death, nevertheless Exp. 2 of Sec. 299 I. P. C. made it clear that the person who caused the injuries must be held to have caused the death of the deceased. (*Roberts C. J., & Dunkley J.*)

Penal Code (Contd.)**NGA PAW vs. EMPEROR.**

1936 Cr.C. 1068 = 165 I.C. 911 = A. I. R. 1936 Rang. 526.

Sec. 299 (Expl. 2)—*Death caused by abscess from wound inflicted by accused—guilt of accused.*

The accused stabbed the deceased in the chest, with such force that the injury was sufficient in the ordinary course of nature to cause death. Death occurred nineteen days after and the medical evidence was that it was due to an abscess, which had it been properly operated might have avoided death.

Held, the accused was guilty of murder, notwithstanding that death would have been avoided if the injured person had submitted to proper treatment. (*Leach & Spargo JJ.*)

EMPEROR vs. NGA SAN PAI.

37 Cr.L.J. 1119 = 1936 Cr. C. 866 = A. I. R. 1936 Rang. 442 = 165 I.C. 245

Secs. 299 & 300—*Culpable homicide amounting to murder—Distinction between,*

The fact that there are two sections namely Sec. 299 & Sec. 300, I. P. C. shows that there is a distinction between culpable homicide amounting to murder and that not amounting to murder quite apart from the exceptions occurring in Sec. 300 itself. An offence is murder, if the death is the most probable result and it is culpable homicide not amounting to murder if death is likely to result. 1 Bom 345 followed. (*Ailsop & Ganjanath JJ.*)

KHIMMAN vs. EMPEROR.

1936 A. W. R. 190 = 1936 A. L. J. 73.

Sec. 300—*Trial for murder—evidence of approver if can be relied upon when it is opposed to the post mortem report.*

In a trial for murder, the evidence of an approver can have no value when it is in direct conflict with the post-mortem report. (*King C. J. & Monroe JJ.*)

NIMHA vs. EMPEROR.

17 Lah. 541 = 38 P.L.R. 954.

Sec. 300—*Assault with dangerous weapons—intention to commit murder, if may be inferred.***Penal Code (Contd.)**

When an assault is committed by a person armed with formidable weapons on an unarmed person, and death ensues as the result of the assault, it is legitimate to draw an inference that the person who committed the assault had the intention to commit murder, unless there is anything to rebut the inference. (*Dalip Singh & Currie JJ.*)

HARNAM DAS vs. EMPEROR.

38 P.L.R. 265

Sec. 300—*One accused charged with murder and another with being accessory after fact—Question of commission of murder by first accused, if in issue between each accused and Crown.*

When of two persons, one is charged with murder and the other with being accessory after the fact, the question whether the deceased had been murdered by the first accused is in issue between each prisoner and the crown; the second accused is entitled to insist on proof and challenge the evidence of it, even if the first accused pleads guilty. (*Sir Sidney Rowlatt.*)

MAHADEV vs. THE KING.

41 C. W. N. 1164 = 1936 A. W. R. 741 = 1936 A. L. J. 869 = 38 Bom. L. R. 1101 = 1936 M. W. N. 929 = 44 M. L. W. 253 = 163 I. C. 681 = A.I.R. 1936 P.C. 242

Sec. 300—*Death caused as a result of attack by accused in course of commission of crime—prima facie case of murder.*

If for the purpose of committing a crime the persons who wish to commit that crime successfully make an attack upon their victims which results in death directly caused by the attack, a prima facie case of murder is set up. (*Cunliffe & Henderson JJ.*)

NITAI CHANDRA JANA vs. EMPEROR.

43 C. W. N. 959 = 1936 Cr.C. 785 = 37 Cr.L. J. 1092 = 165 I. C. 162 = A. I. R. 1936 Cal. 529.

Secs. 300 & 302—*Non discovery of body of murdered man—effect of.*

Usually the fact that the body of a murdered man has not been found, is not of primary evidence in a trial for murder but it becomes so, when there is no evidence to show as to how the body had been disposed of. (*Young C. J. Monroe J.*)

Penal Code (Contd.)**BHONDU vs. EMPEROR.****38 P.L.R. 43**

Secs. 300 & 302—*Accused assisting in buying body of murdered man—no explanation for his action given—accused if can be found guilty of murder.*

Although the fact that a criminal fails to explain very suspicious circumstances against him constitutes evidence which may be taken into consideration against him, yet evidence merely to the effect that the accused assisted in burying the body of the murdered man cannot be considered sufficient to commit the accused on a charge of murder. (*Young C. J. & Monroe J.J.*)

MANGAL SINGH vs. EMPEROR.**17 Lah. 547 = 38 P.L.R. 1018**

Secs. 300 & 302—*Recovery of blood stained knife from house of accused—effect of.*

The mere fact that a knife stained with human blood is recovered from a certain place at the instance of the accused, cannot be sufficient evidence to warrant his conviction, in the absence of other evidence, and specially when the evidence of the eye witnesses is considered to be unsatisfactory. (*Young C. J. & Abdul Raschid J.*)

MITHA SINGH vs. EMPEROR.**38 P.L.R. 215**

Sec. 300, Excep. 1—*Accused in drunken condition finding deceased beating his wife, stabbing him—offence committed.*

Where the accused, while in a drunken condition fatally stabbed the deceased on finding that the latter was beating his wife, who happened to be the aunt of the deceased held, that the offence of beating a wife being a thing of common occurrence among the class to which the accused belonged, the provocation could not be considered sufficient to reduce the offence to culpable homicide not amounting to murder, but could be taken into consideration in awarding sentence. (*Mya Bu & Baguley J.*)

NOA PU NYUM vs. EMPEROR,

37 Cr.L.J. 902 = 1936 Cr.C. 697 = A.J.R. 1936 Rang. 325 = 164 I.C. 206

Penal Code (Contd.)

Sec. 300 Excep 1—*Deceased unnecessarily and without reason interfering when accused was taking away his wife—accused striking deceased—plea of grave and sudden provocation if proper.*

Where the accused struck the deceased fatally for interfering when he was taking away his wife, it might be said that the accused acted under grave and sudden provocation, as no man has a right to interfere between a husband and a wife unless the husband was treating his wife roughly. (*Baguley J.*)

NGA KHAUT vs. EMPEROR

162 I.C. 277 = A.J.R. 1936 Rang. 216 = 37 Cr.L.J. 563

Sec. 300 (1)—*Accused boasting of being the paramour of deceased's wife, and expressing intention of seducing her—if sufficient provocation.*

A public taunting by a man whom one has suspected before of being the paramour of one's wife, and a boasting by the same man expressing an intention to take away the wife is grave and sudden provocation under Sec. 300 (1) I. P. C. (*Roberts C. J. & Dunkley J.*)

NGA MYA MAUNG vs. EMPEROR.**1936 Cr.C. 962 = A.I.R. 1936 Rang. 472**

Sec. 300, Excep. 1—*Grave and sudden provocation, meaning of—accused treated with graves contumely losing self-control and striking deceased, causing death—offence.*

The accused was treated with the gravest contumely by the deceased in course of a quarrel, during which, the deceased was drunk. The evidence showed that the assault would never have been committed, if the deceased had not filthily abused the accused.

Held, what amounts to grave and sudden provocation should be decided according to the circumstances of each case and according to the general standard of self-control amongst the people of the class involved. In the present case, the accused being an ordinary youthful rustic, he could not be expected to possess unusual power of self-control, and hence the offence committed

Penal Code (Contd.)

fell within exception I to Sec. 303 of the Penal Code. (*Ba U, & Mackney JJ.*)

NGA POW YIN vs. EMPEROR

A.I.R. 1936 Rang. 40=1936 Cr.C. 39
=160 I.C. 1077=37 Cr.L.J. 410

Sec. 300, Excep. 1—*Offence committed under grave and sudden provocation—Accused, if entitled to the benefit of Sec. 300 Excep. 1.*

The deceased, a bad character in a village behaved in a outrageous manner by striking the accused with his stick and in such a way as would suffice to make any person of ordinary temper to lose his self-control. The accused who had a blunt weapon in his hand in retaliation stabbed the deceased with it. *Held*, that under the circumstances the accused was entitled to the benefit of Excep. 1 to Sec. 300 Penal Code, and was not guilty of the offence of murder. (*Dunkley J.*)

NGA GA NI & ANR. vs. EMPEROR

161 I.C. 5=A.I.R. 1936 Rang. 49=1936 Cr.C. 73=37 Cr.L.J. 411

Sec. 300, Proviso (1)—*Accused appearing in a quarrel between third persons and stabbing one of them causing death—Offence committed.*

Two persons went to a pew under the influence of drink and began to quarrel with each other. The accused appeared on the spot and caught hold of one of them and asked him why he had struck another person who happened to be accused's brother-in-law and stabbed him in the stomach in course of which he died. *Held*, that proviso (1) to Sec. 300 would have applied if the accused's brother-in-law had not sought the provocation. But as the provocation did not come from the deceased but from the accused's brother-in-law proviso (1) to Sec. 300 did not apply and the accused was guilty of murder. (*Mosely & Ba U. J.*)

NGA PO AUNG GYAW vs. EMPEROR.

A.I.R. 1936 Rang. 115=37 Cr.L.J. 467
=1936 Cr.C. 182

Sec. 300, (1)—*Accused inflicting blow with da, across the centre of the forehead—Knowledge that blow would cause death may be presumed.*

Penal Code (Contd.)

The injury which was inflicted on the deceased was the result of a blow struck with more than ordinary force, with a *da*, across the centre of the forehead above and in line with the nose.

Held, such a blow with such an instrument dealt in such a place could not have been delivered without the accused's knowing that it was sufficient in the ordinary course of nature to cause death. (*Roberts C. J. & Spargo J.*)

NGA OHN PE vs. EMPEROR.

165 I. C. 762=1936 Cr.C. 967=A. I. R.
1936 Rang. 477

Sec. 302—*Murder by a man under intoxication—lesser sentence if may be passed.*

Voluntary drunkenness is not in all or even in the majority of cases a reason for not passing the death sentence. (*Roberts C. J. & Spargo J.*)

NGA OHN PE vs. EMPEROR.

165 I.C. 762=1936 Cr.C. 967=A.I.R.
1936 Rang. 477

Sec. 302—*Husband murdering wife on account of her being unfaithful—lesser sentence if justified.*

The accused was condemned to death for the murder of his wife, who was proved to have been unfaithful to her husband, during his absence for some time from home.

Held, it was not a case where a man at a moment of anger at the infidelity of his wife had killed her. The mere fact that a woman had been unfaithful to her husband was not in itself sufficient ground for substitution of the lesser sentence. (*Young C. J. & Monra J.*)

FAZL KARIM vs. EMPEROR

1936 Cr.C. 657=A.I.R. 1936 Lah. 580

Sec. 302—*Wound caused by accused is five inches deep—intention to cause death, if may be presumed.*

The total depth of injury caused by the accused on the deceased, from the point of entry into the body was not less than five inches. It is obvious that the blow with which the wound was inflicted must have

Penal Code (Contd.)

been delivered with great force. The injury was necessarily fatal, and the presumption arises that the person who inflicted the blow intended to cause death, and was *prima facie* guilty of the offence of murder. (*Roberts C. J. & Dunkley J.*)

NGA PO HTWE vs. EMPEROR

1936 Cr.C. 964 = A.I.R. 1936 Rang. 474

Sec. 302—Murder by several persons—no proof as to who struck the fatal-offence committed.

When several persons join together to cause the death of a man under such circumstances that the offence committed amounts to murder, all such persons are equally guilty of the offence of murder and liable to be punished with death unless there is any extenuating circumstance to justify the court in inflicting a lesser sentence on any individual accused. The fact that there is no evidence to show which of the accused dealt the fatal blow, is no ground for not inflicting the sentence of death. (*Young C. J. & Monroe J.*)

CHAMAN vs. EMPEROR.

17 Lah. 536 = 36 P.L.R. 909

Sec. 302—Accused used weapons like lathis, or blunt side of axes—offence of murder established.

If weapons like lathis, or the blunt side of axes are used in order to break every limb of a man's body, it is just as surely a murder as if the head had been smashed. Injuries on the head are deliberately avoided in most cases in order to support such a defence. (*Young C. J. & Monroe J.*)

DILWAR vs. EMPEROR.

A.I.R. 1936 Lah. 233

Sec. 302 Accused convicted under Sec. 302 shown to be of abnormal temperament—Sentence that should be inflicted.

When an accused is convicted under Sec. 302, Penal Code although it is not proved that he was insane or did not know the nature of his offence, yet if it appears that he was in an abnormal mood when he committed the offence, the extreme penalty of law should not be inflicted. (*Mosely & Ba U JJ.*)

Penal Code (Contd.)

NGA PO SWA vs. EMPEROR;

1936 Cr. C. 180 = 37 Cr. L. J. 435 = 163 I.C. 250 = A.I.R. 1936 Rang. 113

Sec. 302—Single blow inflicted without premeditation following exchange of abuse—death ensuing—proper sentence.

Where following an exchange of abuse the accused in a moment of anger without premeditation dealt only a single blow causing thereby the death of the deceased, held, that although there was nothing to reduce the offence committed by the accused to anything short of murder, the striking of the blow justified the award of the lesser sentence of transportation for life. (*Nanavutty & Smith JJ.*)

SHAFIQ AHMED vs. EMPEROR,

1936 O.W.N. 597

Sec. 302—Murder of husband without motive—Accused making full confession, that she acted under evil spirit and not making even pretence of grief—proper sentence.

The accused murdered her husband, wantonly without any motive whatsoever. The unnecessary brutality of the murder, the large number of injuries inflicted not only on the neck, but also on the chest and face, the fact that she herself brought the neighbours on the scene by her cries, and her failure to make even a pretence of grief by shedding tears, together with the want of an intelligent motive, and the full confession made by her, brings the case within the class in which it is not usual to pass the capital sentence. 10 Bom. 512, relied. (*Dhavl & Agarwallah JJ.*)

MT SUKMI CHAMAIN vs. EMPEROR.

1936 Cr.C. 285 = 37 Cr.L.J. 543 = A.I.R. 1936 Pat. 245 = 162 I.C. 25

Sec. 302—Accused complaining at Police station charging certain person for having murdered his brother—No action taken by police—Accused murdering the father of the person suspected by him—if lesser offence committed.

The accused lodged an information at the Police Station charging certain person with having caused the death of his brother. As the police took no action

Penal Code (Contd)

the accused himself went out with a *Dak* and not finding the person he suspected attacked his father and caused his death. *Held*,

Per Mackney & Mosely JJ.—The fact that the murder of his brother had gone unpunished was not sufficient justification for the accused for taking upon himself the law and that he was liable to get the capital sentence.

Per Baguley J.—The circumstances was an alleviation of the offence of murder and the accused was entitled to receive the lesser sentence allowed in the case of murder.

NGA PO U vs. EMPEROR.

1936 Cr.C. 37 = A.I.R. 1936 Rang. 38 = 160 I.C. 466 = 37 Cr.L.J. 297

Sec. 302—*Death caused without pre-meditation in a sudden quarrel—proper sentence,*

When a fatal is struck by one party on the other, in the course of a sudden quarrel, and it is clear that the act is done without premeditation and in the heat of the moment, the proper sentence to be passed is not death, but transportation for life. (*Young O, J. Abdul Rashid JJ.*)

NANDLAL vs. CROWN.

16 Lah. 1098 = 160 I.C. 606(1) = 37 Cr. L.J. 307 = 38 P.L.R. 111

Sec. 302—*Premeditation to cause death not proved—death sentence, if may be passed.*

In a trial for murder, the absence of proof of premeditation is a good ground for not passing the sentence of death. (*Baguley & Ba U JJ.*)

A PLET vs. EMPEROR.

A.I.R. 1936 Rang. 28 = 1936 Cr.C. 32 = 37 Cr.L.J. 449 = 161 I.C. 297

Sec. 302—*Fracture of the skull by injury—intention of causing death if may be presumed—young age of accused—injuries inflicted in dark—capital sentence, if proper.*

An accused inflicted injuries on the head of the deceased fracturing the skull. The injuries as of themselves were sufficient, in the ordi-

Penal Code (Contd)

nary course of nature, to cause death, *Held*, that the person who inflicted them must be presumed to have had the intention of causing death. *Held* further, that the young age of the accused and the fact that the injuries had been inflicted in the dark. Justified the Court in inflicting the lesser sentence of transportation for life. (*Mosely & Ba U JJ.*)

NGA THEIN MAUNG vs. EMPEROR.

1936 Cr.C. 45 = A.I.R. 1936 Rang. 46 = 160 I.C. 459 = 37 Cr.L.J. 290

Sec. 302—*Evidence of one witness if sufficient for conviction where other evidence unreliable.*

In a murder case is not proper to convict the accused on the testimony of one individual witness where there were other witnesses relied on by the prosecution but the evidence of those witnesses were rejected by the judge as being unreliable. (*Addison & Abdul Rashid JJ.*)

NURA & ORS. vs. THE CROWN.

38 P.L.R. 274 = 164 I.C. 1056 = 37 Cr.L.J. 1029 = 1936 Cr. C. 769 = A.I.E. 1936 Lah. 778

Sec. 302—*Murder—Assault on unarmed person with formidable weapons—Inference to be drawn.*

Where an unarmed person was assaulted by the accused who were armed with formidable weapons and the medical evidence showed that the two fatal blows inflicted on the scalp were individually fatal, and there were numerous other injuries including a broken left fore-arm, the inference in the absence of any thing to rebut it, is that the intention was to commit murder. (*Dalip Singh & Currie JJ.*)

HARNAM DAS vs. THE CROWN.

38 P.L.R. 265

Sec. 302—*Small spots of human blood on cloth of accused—probative value for offence of murder.*

A dhoti and a longyi belonging to the accused had small spots of human blood on them, and was produced in evidence on a charge of murder against the owner. *Held*, in the absence of a large patch of

Penal Code (Contd.)

blood which would suggest beyond all doubt that the wearer of the garment had been engaged in a ferocious attack upon a human being, small spots of blood have no probative value. It may be accounted in other ways. If a mosquito bites a man through his clothes and it is squashed, as after happens, the victim's clothes may have a patch of blood of any size up to three-quarters of inch in diameter and that blood may be the blood of the victim which had been sucked into the mosquito's stomach or what corresponds to it. If that blood is transferred to a garment from the Imperial serologist's point of view, it is still human blood. Its short stay in the mosquito will not greatly change its nominal characters.

The again, dhoti and longyi being two mutually exclusive garments blood stains on both the garments show that the stains have nothing to do with murder, as the murderer would not be wearing both the dhoti and the longyi at the same time. (*Roberts C. J. & Baguley J.*)

TEREGU vs. EMPEROR.

165 I.C. 758=1936 Cr.C. 968=A.I.R. 1936 Rang. 468

Sec. 302—Deep wound inflicted on chest-penetrating upto chest cavity—Death ensuing—Offence, if amounts to murder.

The accused inflicted two wounds one on the left wrist and the other on the chest. The latter wound penetrated into the chest cavity cutting the 5th rib and the covering of the heart. The wound was according to medical witnesses necessarily fatal. Held, that the offence committed by the accused was one of murder. (*Ba U & Mac-kney, J.*)

NGA KAN vs. EMPEROR.

161 I. C. 574=A. I. R. 1936 Rang. 71=37 Cr.L.J. 463=1936 Cr.C. 76

Sec. 302—Death caused by stab wound penetrating abdomen—Sentence.

A stab wound penetrating into the abdominal cavity and cutting the small intestine is necessarily fatal, and the offence of inflicting such a wound amount to murder, for which in the absence of extenuating circumstances in favour of the accused, the sentence of death is appropriate. (*Mosley & Bg U, JJ.*)

Penal Code (Contd.)**U ZAWANA vs. EMPEROR.**

161 I.C. 113=A.I.R. 1936 Rang. 60=37 Cr.L.J. 318=1936 Cr.C. 88

Sec. 302—Accused committing murder in the heat of moment—Sentence that should be passed.

Where in the course of a quarrel the accused struck one blow on the deceased which proved fatal, and it was apparent that there was not premeditation, held that in such a case the more appropriate sentence to be passed on the accused was transportation for life and not death. (*Young C. J. & Abdul Rashid J.*)

NANDLAL vs. CROWN.

16 Lab. 1098=38 P.L.R. 111=160 I.C. 605(1)=37 Cr.L.J. 307

Sec 302—Accused's name mentioned in first report of murder—motive proved—conviction if justified.

Where the name of the accused was mentioned in first information report of the murder of a woman and it was proved that the accused had some motive for attacking the deceased and there was nothing to show that any other person had such intention and there were other evidence to satisfy the Court that the accused caused the fatal injuries, held, that the accused was liable to be convicted of murder under Sec. 302, Penal Code. (*Nanavutty & Smith JJ.*)

KALKA vs. EMPEROR.

1936 O.W.N. 603=37 Cr.L.J. 932=164 I.C. 54

Secs. 302 & 304—Deceased seizing paddy belonging to accused unlawfully—provocation not grave and sufficient to bring the case under Sec. 304—proper sentence under Sec. 302.

The accused without lawful authority attempted to seize paddy belonging to the father. Although it did not amount to provocation of a nature which would reduce the crime to one of culpable homicide not amounting to murder, it was a sufficient factor to justify the Court to pass the lesser sentence under Sec. 302. (*Leach & Spargo JJ.*)

EMPEROR vs. NGA SAN PAI.

1936 Cr.C. 866=37 Cr.L.J. 1119=165 I.C. 245=A.I.R. 1936 Rang. 442

Penal Code (Contd.)

Secs. 302 & 304—*Intention of accused—Circumstances from which it has to be inferred.*

In order that culpable homicide can amount of murder there must be intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death. This intention has to be inferred from the nature of the injuries inflicted on the deceased and the weapons used by the accused for inflicting such injuries (*Grille J. C. Neogy, A. J. C.*).

JAMES DOWDALL vs. EMPEROR.

31 N.L.R. 215 = A.I.R. 1936 Nag. 103
= 162 I.C. 430 = 36 Cr.L.J. 607 = 1936 Cr.C. 605

Secs. 302 & 304—*Death caused by a single blow by accused on knee of the deceased—Offence of which he should be convicted.*

The accused was put up for trial on a charge of murder. It was proved in evidence that the death of the deceased was caused by a single blow with a *dao* inflicted by the accused on a non-vital part of the body, namely, the knee. Held, that under the circumstances the intention to be attributed to the accused was that he never intended to cause either death or a wound sufficient in the ordinary course of nature to cause death, and he was therefore liable be convicted not under Sec. 302, Penal Code but under Sec. 304, 1st Part of the Code. (*Mosely & Ba U. JJ.*)

NGA TIN MAUNG vs. EMPEROR.

A.I.R. 1936 Rang. 112 = 161 I.C. 515 = 37 Cr.L.J. 473 = 1936 Cr.C. 192

Secs. 302 & 304—*Accused in a drunken condition seeing his aunt being beaten by her husband stabbing him causing death—offence committed.*

The accused who was in a drunken condition was enraged at the sight of his aunt being beaten by her husband, and immediately stabbed him with a knife causing his death. Held, that the beating of a wife by her husband being a common thing among the class of people to which the accused belonged, the provocation on which the accused acted could not be said to be such as to reduce the offence to one

Penal Code (Contd.)

of culpable homicide not amounting to murder, but it could be taken into consideration in awarding sentence. (*Baguley Dunkley JJ.*)

NGA PO NYUN vs. EMPEROR.

A.I.R. 1936 Rang. 225 = 164 I.C. 406 = 37 Cr.L.J. 902 = 1936 Cr.C. 697

Secs. 302 & 326—*Death caused by several injuries—No evidence as to which of the injuries caused by accused.*

The accused died of several injuries inflicted by several persons including the accused. Of the injuries, the first was sufficient in the ordinary course of nature to cause death, the second and fourth injuries were grievous, the third was necessarily fatal, and the last was simple. Held, in the absence of any evidence to show that the accused struck the first or the third blow he could be convicted not of murder but of causing grievous hurt. (*Leach & Spargo J. J.*)

NGA SEIN vs. EMPEROR.

A.I.R. 1936 Rang. 446

Sec 302 & 326—*Two accused charged under Sec. 302—Absence of anything to show who committed the crime or that there was common intention—Abetment.*

Where two accused are charged under Sec. 302, Penal Code and there is nothing to show which of them committed the crime or that there was no common intention to commit the crime of murder, but one of them must have committed it, it cannot be said that the other abetted the crime of murder by his mere presence, in the absence of any evidence to show that he instigated the murder or intentionally committed it or engaged in a conspiracy to commit murder. The mere fact that the accused's companion tried to commit the crime freely on the deceased's companion is not sufficient in itself to show that the accused's companion contemplated murder being done. (*Mosely & Ba U. JJ.*)

NGA BA KYAING & ANR vs. EMPEROR.

A.I.R. 1936 Rang. 131 = 162 I.C. 6 = 37 Cr.L.J. 531 = 1936 Cr.C. 219

Sec. 304—*Unpremeditated joint attack by accused with sticks causing death—Offence committed.*

Penal Code (Contd)

Where there was a premeditated joint attack by the accused in course of which each of the individual accused beat the deceased with a stick, nothing more than the knowledge that their joint act in its cumulative effect was likely to cause death could be imputed to them collectively. In such circumstances the accused could therefore be only convicted under the second part of Sec. 304, Penal Code. (*Grille J. C. & Neogy A. J. C.*)

JAMES DOWDALL vs. EMPEROR.

31 N.L.R. 215 = A.I.R. 1936 Nag. 103 = 162 I.C. 430 = 37 Cr.L.J. 607 = 1936 Cr. C. 605

Sec. 304—Death caused by striking with a branch of a tree—Nature of the offence committed.

Where an accused strikes a blow on the side of the head of a person with a branch of a Neem tree, which is likely to cause death, but death is not the most probable result of his act, he is guilty of culpable homicide not amounting to murder. (*Allsop & Ganganath, J.J.*)

KHIMMAN vs. EMPEROR,

1936 A.W.R. 190 = 1986 A.L.J. 73

Sec. 304—Death ensuing as a result of the fracture of the skull caused by a lathi blow on the head—Offence committed.

Where the accused hit a person with a lathi, just on the arm and when his arm was disabled, gave two blows on the head and his skull was fractured and he died as a result of the injuries, held, that the accused must have known that he was likely to cause death, but that would not make the offence one of murder; it would be merely an offence of culpable homicide not amounting to murder. The use of a lathi is certainly dangerous but it is not so dangerous that one would suppose that any body would in the ordinary course think that death is the probable cause of the use of a lathi. (*Allsop & Ganganath J.J.*)

PERANA & ORS. vs. EMPEROR.

1936 A.W.R. 327 = 1936 A.L.J. 333 = 164 I.C. 952 = 37 Cr.L.J. 1020

Sec. 304, cl (1)—Father of child striking fatal blow on deceased for beating his boy frantically—act, whether under grave and sudden provocation.

Penal Code (Contd)

The deceased struck the accused's child aged only one year merely because it resented its toy being taken away. Such an act surely rouses such resentment in the mind of any father as to amount to grave and sudden provocation which would cause him for the time being entirely to lose his self-control. Consequently, the offence committed by the accused in striking the deceased with the weapon nearest to his hand was not the offence of murder but the offence of culpable homicide not amounting to murder. (*Roberts C. J. & Dunkley J.*)

NGA PAW vs. EMPEROR.

1936 Cr.C. 1068 = 165 I.C. 911 = A.I.R. 1936 Rang. 526

Sec. 304, Part I—Murder committed as the result of the use of highly provocative language—Sentence.

Where the accused committed a murder as the result of the deceased using highly provocative language, held, that the offence fell under Sec. 304, Part I of the Penal Code, and a sentence of 5 years' rigorous imprisonment was sufficient. (*Young C. & Monroe J.*)

BHONDU & ORS. vs. THE ORWN.

38 P.L.T. 43

Sec. 204A—Death caused by a motor lorry, plying with inefficient brakes and absence of horn—no rashness or negligence in use of road or manner of driving—conviction under the section if proper.

The "rash or negligent act" referred to in Sec. 304 A, Penal Code, means the act which is the immediate cause of death and not any act or omission which can at most be said to be a remote cause of death. So where the accused motor driver, ran over and killed a woman but there was no rashness or negligence on his part, so far as his use of the road or manner of driving was concerned, held, that the accused could not be convicted under Sec. 304 A, Penal Code, on the ground that the brakes of the lorry were not in perfect order, and that the lorry carried no horn. 55 All. 263 relied on. (*Nanavutty & Zia-ul-Hasan J.*)

EMPEROR vs. AKBAR ALI.

1936 O.W.N. 720 = 164 I.C. 333 = 37 Cr. L.J. 915 = 1936 Cr.C. 1083 = A.I.R. 1936 Oudh 400

Penal Code (Contd)

Sec. 307—*Accused firing at police party—Shots causing no hurt—Offence committed.*

Where the accused fired his pistol in the direction of the police party headed by a police officer but the shots did not cause hurt to any one, *held*, the fact that the shots passed over the heads of the policemen and did not cause hurt to any one could not go to prove that the accused did not commit the offence under Sec. 307, I. P. Code. The fact that the accused did not aim his pistol at the station-officer could not go to take his offence out of the purview of Sec. 307. (*King C. J. & Nanavutty J.*)

EMPEROR vs. MUNSHI.

1936 O.W.N. 553 = 37 Cr.L.J. 787 = 1936 Cr.C. 648 = 182 I.C. 844 = A.I.R. 1936 Oudh 294

Sec. 323 & 325—*Several persons attacking with lathis a common enemy Blow by one causing grievous hurt—All accused, if equally guilty.*

Where several persons combined to attack with lathies a common enemy and a blow dealt by one of them caused grievous hurt, all of them are guilty of causing grievous hurt. (*Niamatullah J.*)

JAIMANGAL & ORS. vs. EMPEROR.

1936 A.W.R. 298 = 1936 A.L.J. 462 = 163 I.C. 848 = 37 Cr.L.J. 764 = 1936 Cr. C. 601 = A.I.R. 1936 All. 447

Sec. 325—*Several persons concerned in assault on deceased—grievous hurt caused by blow inflicted by one not identified—liability of all.*

Where the deceased was attacked by several assailants, and one of them inflicted a severe blow causing grievous hurt, but it was not known who inflicted the particular blow, *held*, that the presumption arose that each of the assailants had the intention of causing grievous hurt, and therefore all the accused were liable to be convicted under Sec. 325, Penal Code, 29 All. 282 followed. (*Skemp J.*)

HASHAM vs. EMPEROR.

37 Cr.L.J. 428 = 1936 Cr.C. 11 = A.I.R. 1936 Lah. 28 = 161 I.C. 344

Sec. 325—*Offence of causing grievous hurt—Sentence of fine only if legal.*

Penal Code (Contd)

For an offence of causing grievous hurt under Sec. 325, Penal Code, a sentence of fine only without a sentence of imprisonment is not permissible; but where a sentence of fine only has been passed and the fine has been paid, the High Court will not interfere and pass a sentence of imprisonment particularly when many months have elapsed since the case was disposed of. (*Skemp J.*)

CROWN vs. GHANISAM & ORS.

38 P.L.R. 229

Sec. 335 354—*Accused deputed to execute decree using violence sufficient only to remove woman resisting—accused, if guilty of offences under Secs. 323 & 354.*

The accused, a process-server was deputed to execute a decree for the delivery of a house. A woman who was not a parda-nashin lady having resisted and refused to vacate the house to which she was not legally entitled, the accused used violence only sufficient to remove her, and in the struggle her cloth got loose. *Held*, that under the circumstances it could not be said that there was an attempt made to violate the modesty of the woman, and the accused who acted in good faith could not be convicted of causing hurt or of assaulting a woman with the intention of outraging her modesty. (*Nanavutty J.*)

BAIJNATH & ORS. vs. EMPEROR.

1936 O.W.N. 601 = 164 I.C. 99 = 37 Cr. L.J. 892 = 1936 Cr.C. 988 = A.I.R. 1936 Oudh 379

Sec. 330—*Causing hurt by police officer engaged in the investigation of a crime for the purpose of extorting a confession—Necessity for inflicting deterrent sentence.*

There is a great difference between a conviction under Sec. 330 Penal Code and under Sec. 223 of the Code though both of them concern simple hurt. The law draws a very great distinction between simple hurt caused in the ordinary way and simple hurt caused for the purpose of extorting a confession or making an accused person recover any property. The conduct of causing hurt by responsible Police officer engaged in the investigation of a crime is one of the most serious offences known to

Penal Code (Contd.)

the law. The result of third degree methods or of actual torture or beating must be that innocent person might well be convicted, confessions being forced from them which are false. Therefore, when a case of this kind is proved it is clearly the duty of the court to pass a sentence which may have a deterrent effect. (*Young C. J.*)

LAL MAHMMAD & ANR. vs. EMPEROR.

33 P.L.R. 689=163 I.C. 145=37 Cr.L.J. 811=1936 Cr.C. 506=A.I.R. 1936 Lah. 471

Secs. 352 & 426—Persons charged under Sec. 426, if can be convicted under Sec. 362.

Where the accused was summoned to answer a charge under Sec. 426, Penal Code, of causing mischief, but was convicted of the offence of assault under Sec. 352 of the Code, held, that the conviction could not stand in the absence of evidence to show that the accused had been informed that he had to defend himself against the offence of assault as well. (*Khaja Mohammed Noor J.*)

RAMDHANI MAHTON vs. EMPEROR.

17 P.L.T. 572=165 I.C. 600=37 Cr.L.J. 1156(1)=1936 Cr.C. 898(1)=A.I.R. 1936 Pat. 536

Secs. 361, 362 & 366 A—Kidnaping from lawful guardianship—abduction—common features—Offence under Sec 366 A and 362—Resemblance.

Unlike the offence of kidnapping from lawful guardianship, abduction is a continuing offence, and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place another. There is a close resemblance in the texts of Secs. 362 and 366-A, I, P. C. and some of the salient ingredients of the two offences are common, and it must be held that an offence under Sec. 366-A is also a continuing offence. The differences between Sec. 366 & 366-A merely concern the manner of the inducement and the age of the girl, and are irrelevant for the question of continuing offences. 53 All. 140, 53 Cal. 1004 referred. (*Skemp J.*)

CHIRAGH vs. EMPEROR.

1936 Cr.C. 873=A.I.R. 1936 Lah. 850

Penal Code (Contd.)

Secs. 361 & 363—Girl turned out by her husband taken by accused to his house—offence of kidnapping if committed.

Where a girl below sixteen years of age has been turned out by her husband she cannot be considered to be in the constructive guardianship of her husband, and therefore a person who took her away to his own house cannot be held to be guilty of the offence of kidnapping from lawful guardianship under Sec. 363 Penal Code. The position is entirely different where the girl was living with a lawful guardian but was taken or enticed away from a street or some other place of resort. In such a case the guardian retains the custody of the minor even though the latter is not actually in the house. (*Niamatullah J.*)

FRANCIS HECTOR vs. EMPEROR.

1936 A.W.R. 1065

Sec. 365—Girl removed by force from her parents house at the instance of her husband—Offence committed.

Where a girl was removed by force by the applicants from her father's house at the instance of her husband and she was taken to her husband's brother-in-law's house so that her father should not be able to find her, held, that the intention of the applicants at the time of abduction could only be deduced from what they subsequently did, and the Sessions Judge was entitled to come to the conclusion that she was to be secretly confined in that house and therefore the conviction of the applicant under Sec. 365 Penal Code, was justified.

GUANGRU & OTHERS vs. EMPEROR.

1936 A.L.J. 827=1936 A. W. R. 441=1936 Cr.C. 424=163 I. C. 301=A.I.R. 1936 All. 360

Sec. 366—Essential—Kidnaping of girl above sixteen years if any offence.

In a case of kidnapping a girl, the age is always a very relevant factor. The fact that the girl has exceeded sixteen years of age makes the accused free from guilt, and the Judge should always make a specific finding on the age of the

girl from the jury. (*Cunliffe & Henderson JJ.*)

SAMARALI vs. EMPEROR.

1936 Cr. C. 932 = A. I. R. 1936 Cal. 675.

Sec. 366—*Minor girl found with accused—provision of the section, if applicable*

Sec. 366, Penal Code cannot be applied to a case where it appears that the accused had been carrying on an intrigue with a minor girl and the girl had thereafter gone away with him, but there is nothing directly to show that the accused had induced the girl to leave her husband's home. (*Skemp J.*)

MST. ALLI RAKHI vs. THE CROWN.

38 P. L. R. 98

Sec. 366—"Seduce"—meaning of—*person if an be convicted under the section where the girl kidnapped had illicit intercourse with him before the kidnapping took place.*

The term "seduce" in Sec. 366, Penal Code is used in the general sense of "enticing or tempting", and not in the limited sense of committing the first act of illicit intercourse. Therefore a person can be guilty of an offence under this section, even where the girl kidnapped had illicit intercourse with him before the kidnapping took place. 57 Cal. 107 & 9 Pat. 647 relied on 35 Cr. L. J. 1386 dissented from. (*Divatia J.*)

EMPEROR vs. LAXMAN BALA KAVLYA.

59 Bom. 652

Sec. 366—*Woman of 18 willingly going with accused—no force or deceit proved—charge of abduction or kidnapping whether sustainable.*

The accused was charged with having kidnapped a woman for the purpose of illicit intercourse. The woman was found to be of 18 years or more in age and there was no evidence to show that she had been abducted by force or deceit. The woman was not examined. Held, that under the circumstances, the accused could not be proceeded against under Sec. 366, Penal Code. (*Rowland J.*)

ALI KHALIFA vs. EMPEROR.

1936 Cr. C. 145 = 160 I. C. 161 = A. I. R. 1936 103

Secs. 366 & 460—*Lorry engaged for abducting girl—driver ignorant of purpose but participating in the crime—liability.*

Where a motor lorry was engaged for the purpose of abducting a girl, but the driver of the lorry was ignorant of the purpose for which the lorry had been engaged, but continued to do his part of the work even after he came to know of the real purpose, held, that although the driver was liable to be convicted, a sentence of six months' imprisonment was sufficient (*Skemp J.*)

MOHAMMAD SHAFI vs. EMPEROR.

38 P. L. R. 323 = 37 Cr. L. J. 430 = 193 Cr. C. 2 = A. I. R. 1936 Lah. 15 = 161 I. C. 313

Sec. 366 A—*Section if applies where there is no evidence that accused took girl from one place to another with intent to seduce her to illicit intercourse with another person.*

Sec. 366 A, Penal Code does not apply where there is no reliable evidence to show that the girl was taken by the accused from one place to another with the intention that she be seduced or forced to illicit intercourse with another person. (*Niamatullah J.*)

FRANCIS HECTOR vs. EMPEROR.

1936 A. W. R. 1065

Sec. 368—*Offence of kidnapping or abduction not made out—charge under the section if must fail.*

Sec. 368, Penal Code presupposes that the offence of kidnapping or abduction has taken place so that any one wrongfully confining the person kidnapped or abducted is guilty of an offence under Sec. 368 Penal Code. Where no offence of kidnapping or abduction has been made out the charge under Sec. 368, fails. (*Niamatullah J.*)

FRANCIS HECTOR vs. EMPEROR.

1936 A. W. R. 1065

Sec. 372—*Charge under the section, how to be drawn up—charge in general terms, if prejudices accused and vitiates conviction.*

In a case under Sec. 372, Penal Code involving more offences than one, a separate charge should be drawn up with regard to each visitor up to the number three.

Penal Code (Contd.)

When the charge is drawn up as though the offence were a general one of living on on the immoral earnings of a woman, such a charge leading to a scrappy cross-examination the accused is prejudiced and his conviction cannot be sustained. (*Cunliffe & Henderson J.*)

SARALA PESHKAR vs. EMPEROR.

40 C.W.N. 1188

Sec. 372—Offence under the section, ingredients of—proof of actual hiring, if essential—mere payment of money to accused, if such proof.

Assuming that Sec 372 Penal Code applied to an arrangement made between a manager of a brothel and individual visitors with regard to isolated acts of sexual intercourse, still in order to support a conviction under the section there must be proof the act of hiring between the manager and visitors. The mere fact of payment of money to the manager by the visitors is no such proof. (*Cunliffe & Henderson JJ.*)

SARALA PESHKAR vs. EMPEROR.

40 C.W.N. 1188

Sec. 376—Girl above fourteen years, a consenting party to illicit intercourse—accused if can be convicted under Sec 376.

Where the girl who is above fourteen years of age is a consenting party to the sexual intercourse with the accused, the accused cannot be held guilty under Sec. 376 Penal Code. (*Niamatullah J.*)

FRANCIS HECTOR vs. EMPEROR.

1936 A.W.R. 1065

Secs. 376 & 377—Class of Magistrates who should be entrusted with the trial of offences under the section.

Cases of rape and unnatural vice should as far as possible be tried by Magistrates empowered with power under Sec. 30 of the Cr. P. Code, so that if circumstances call for a heavy sentence, then the same may be given, up to the outside limit of 7 years. (*Agha Haidar J.*)

EMPEROR vs. SHERA.

38 P.L.R. 437 = 161 I.C. 591(1) = 37 Cr. L.J. 474(1) = 1936 Cr.C. 205(1) = A.I.R. 1936 Lab. 256

Penal Code (Contd.)

Sec. 377—Offence under the section committed after using violence—Proper sentence.

Where a person commits an unnatural offence after using violence, a sentence of whipping in addition to rigorous imprisonment is eminently right and proper. (*Agha Haidar J.*)

EMPEROR vs. SHERA.

38 P.L.R. 437 = A.I.R. 1936 Lab. 256 = 161 I.C. 591(1) = 37 Cr. L.J. 474(1) = 1936 Cr.C. 205(1)

Secs. 378 & 379—Temporary removal of a thing without criminal intent, if constitutes theft.

The accused, a respectable person, finding his own cycle missing took away the cycle of another person, but later brought it back. Held, that as the accused had no criminal intent or ulterior motive in taking away the cycle and as he did not intend by his act to cause unlawful gain to himself, he was not guilty of the offence of theft. (*Nanavutty J.*)

RAMESHWAR SINGH vs. EMPEROR.

1936 O.W.N. 258 = 161 I.C. 268 = 37 Cr. L.J. 456

Sec. 378—Accused taking fish from running stream—theft, if committed.

The taking of fish from running stream, the fishery right of which vests in the complainant who has a jalkar right in the stream does not constitute the offence of theft unless there is evidence to show that the fish are enclosed in such a way that they may be said to be practically in confinement, and to be brought into possession of the owner of the fishery right. (*James J.*)

SHEIKH ELAHI BUX vs. EMPEROR.

17 P.L.T. 189 = 37 Cr.L.J. 452 = 1936 Cr.C. 236 = A.I.R. 1936 Pat. 152 = 161 I.C. 477

Sec. 378—Person permitted to have certain quantity of goods, taking more—Offence of theft if committed.

Where a person being permitted by another to take away a certain quantity of goods takes advantage of the confidence reposed in him and removes a larger quantity of goods than what he was permitted to do, he is guilty of theft and the offence is not mere technical but is a real one punishable

Penal Code (Contd.)

according to the nature of the crime.
(*Vivian Bose J.*)

GANPAT & ANR. vs. EMPEROR.

19 N.L.J. 187

Secs. 379 & 447—*Accused purchasing share of land and structures on land owned by co-sharers—Huts belonging to co-sharers blown away—New huts built on same land by accused with materials of blown away huts—Accused, if guilty under Sec. 379.*

A co-sharer in possession of a joint property has the undoubted right to remove a movable property in his possession and also in the possession of other co-sharers from one spot of the joint land to another spot of the same land. There is no wrongful loss to the other co-sharers in such a case. As he is a part owner of the land he has every right to remain there. If the other co-sharers come to resist him, and in in spite of their protest he remains upon the land, it cannot be said that he entered the land to intimidate, insult or annoy the other co-sharers. In either case, the accused is not guilty under Sec. 379, for using the materials of the blown away huts or under Sec. 447, for remaining in possession in spite of protest by co-sharers. (*R. C. Mittra J.*)

NITYANANDA PODDAR vs. RUPAI BEPARI.

A.I.R. 1936 Cal. 261=162 I.C. 660=
37 Cr.L.J. 747=1936 Cr.C. 485

Sec. 395—*Accused producing property removed by dacoits, if can be committed for dacoity.*

When the accused produced certain property which had been taken away by dacoits from under a tree in a certain field which did not belong to the accused, but there was no other evidence to connect the accused with the commission of the dacoity, *Held*, that the accused could not be convicted under Sec. 395 Penal Code. (*Nanavutty J.*)

RAM AUTAR vs. EMPEROR.

37 Cr.L.J. 454=1936 O.W.N. 295=161 I.C. 271

Sec. 395—*Sentence to be ordinarily passed for offence of dacoity.*

Dacoity being a most serious crime

Penal Code (Contd.)

which it is difficult to detect in the sense of bringing home the offence to the culprits, in the ordinary circumstances, a sentence of rigorous imprisonment for a period of 7 years is the least sentence which should be passed. (*Allsop & Ganganath JJ.*)

EMPEROR vs. LAKHAN SINGH & ORS.

1936 A.W.R. 274(2)=1936 A.L.J. 739
=162 I.C. 499=37 Cr. L. J. 595=1936
C. 477=A.I.R. 1936 All. 311

Sec. 396—*Dacoity with murder—Punishment that should be inflicted.*

Sec. 396, Penal Code expressly provides that the extreme penalty can be imposed on all participants in the dacoity and ordinarily it is the normal punishment for dacoits present at a dacoity in which a wanton murder is committed. But when a lesser sentence has been inflicted, it need not be enhanced in a case where the accused gives a confession readily as soon as he is tackled, and there is nothing to show that any inducement was given him to do so, but it is clear he must have done so under the belief or hope that he would be made an approver or given more lenient punishment if he made confession and rendered such service as he could to the police, (*Mosley & Ba U, JJ.*)

NGA SAN BA vs. EMPEROR.

161 I.C.=A.I.R. 1936 Rang. 75=37 Cr.
L.J. 414=1936 Cr.C. 80

Sec. 396—*Murder committed wantonly to intimidate villagers during dacoity—sentence that should be inflicted.*

Sec. 496, Penal Code was expressly enacted in order to punish with the utmost severity of the law, crimes of murder committed not in self defence nor in retreat, but wantonly in order to intimidate the house-owners and the neighbouring villagers in the course of a dacoity, (*Mosely & Mackney JJ.*)

EMPEROR vs. NGA THA HMWE & ORS.

37 Cr.L.J. 297=A.I.R. 1935 Rang. 405
=160 I.C. 234

Sec. 403 & 415—*Accused receiving money from complainant for bribing officers—offence committed.*

In order to make out a case of criminal misappropriation, it is necessary that the

Penal Code (Contd)

property misappropriated should have come into possession of the accused innocently in the first instance. When therefore the accused received money from the complainant on the plea that it was to be paid to certain officers for providing the complainant with a job, and the accused misappropriated the amount, he cannot be proceeded against under Sec. 403, Penal Code. Nor will a charge of cheating lie, where it is not alleged that the accused at the time when he received the money did not intend to use it for the purpose of bribing officers or that he did not do his best to secure the post for the complainant. (*Dunkley J.*)

GARDNER vs. U KHA.

1936 Cr.C. 961 = 165 I.C. 596 = A.I.R. 1936 Rang. 471

Sec. 405—Particulars required in a charge under the section.

A charge under Sec. 405 Penal Code is indefinite and unsustainable, if it does not indicate with sufficient clearness, the particular clause of the section under which the offence complained of comes, and if it does not state who made the alleged entrustment and who suffered from the alleged breach of trust. (*Lort Williams & Jack J.*)

ABINASH CH. SARKAR vs. EMPEROR.

63 Cal. 18 = 161 I.C. 280 = 37 Cr.L.J. 439

Sec. 405—Keys of room entrusted with accused found in possession of another with accused's connivance—accused if guilty.

Where the keys of a record room entrusted for safe custody to the accused was found in the possession of a third person, and access had thereby been corruptly given to the records, which had been partly misappropriated, *held*, that the fact that the accused himself did not misappropriate or use or dispose of any record in violation of trust was immaterial, and the second part of the definition in Sec. 405, Penal Code, brought home the offence to the accused. (*Rowland J.*)

ABDUS SALAM vs. EMPEROR.

1936 Cr.C. 142 = 160 I.C. 12 = A.I.R. 1936 Pat. 108 = 37 Cr.L.J. 219

Penal Code (Contd)

Sec. 405—Criminal breach of trust—place of suing.

The first part of Sec. 405 Penal Code will apply where it is known that the accused had dishonestly misappropriated or converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But where it is alleged that the accused being entrusted with property has failed to account for in violation of legal contract touching the discharge of the trust and it is not alleged that he has actually misappropriated or converted to his own use the property by any positive act, the second part of Sec. 405 will apply, and the jurisdiction exists at the place where the property should have been delivered or accounted for. (*Sulaiman C. J. & Bennet J.*)

MOHRU LAL vs. EMPEROR.

58 All. 644 = 1936 A.L.J. 3 = 1936 A.W.R. 23 = 160 I.C. 356 = 37 Cr.L.J. 284 = 1936 Cr.C. 214 = A.I.R. 1936 All. 193

Sec. 405 & 406—Sale of gramophone on instalment basis—no payment of instalment—offence committed.

Where a gramophone dealer sold a gramophone to the accused on instalment basis and on the failure of the accused to pay the instalment due asked for the return of the machine, which was however not returned to the seller at the time, but was subsequently produced in court, *held*, that the accused could not be convicted of any criminal offence, and the matter was entirely of civil dispute. (*M. C. Ghosh J.*)

KALIPADA MONDOL vs. KALI KINKAR CHATTERJEE.

1936 Cr.C. 931 = A.I.R. 1936 Cal. 674 = 161 I.C. 827

Sec. 405 & 406—Pledge of ornaments to accused—accused not returning some on repayment of loan—offence committed if any.

Where the complainant had pledged certain jewellery to the accused, but the latter denied the pledge and refused to return the jewellery after the loan had been paid off, although he admitted the amount paid by the complainant, *held*, that the

Penal Code (Contd.)

accused was criminally liable and was guilty of an offence under Secs. 405 & 406 Penal Code. (*Jack J.*)

ABINASH CH. KUMAR vs. DHANI BAKSH MOHAMAD.

62 C. L. J. 497=1936 Cr. C. 939=165 I.C. 905=A.I.R. 1936 Cal. 673

Secs. 405 & 408—*Failure of servant to deliver money realised, if an offence under the section.*

Where a servant fails to render accounts and to deliver up money realised by him on behalf of his master in spite of repeated demands, he used the money entrusted to him in violation of the legal contract made by him with his master and is thus guilty of an offence under Sec. 408, Penal Code. (*Zia-Ul-Hasan J.*)

BRIJKISHORE vs. CHANDRIK PROSAD.

1936 O. W. N. 212=160 I. C 567=37 Cr.L.J.322=1936 Cr.C.847=A.I.R. 1936 Oudh 329

Secs. 405 & 409—*Criminal breach of trust—nature of proof required for conviction—charge against agent—liability if continues when agency terminated.*

To establish a charge of criminal breach of trust the prosecution must allege and prove a guilty mind, which is the gist of the offence. Failure to account for the money or giving a false account as to its use makes a strong case against the accused, but is not all that is required to be proved under the law. Sec. 409, provides that a person charged with the offence of criminal breach of trust by an agent must have been entrusted with the property in his capacity as an agent, but the section does not require that the person charged should be still an agent at the time of committing the breach of trust. (*Varma & Rowland JJ.*)

EMPEROR vs. CHATURBHUI NARAIN CHOWHURY.

15 Pat. 108=17 P.L.T. 302=164 I. C, 74=37 Cr.L.J. 877=1936 Cr. C. 543=A.I.R. 1936 Pat. 350

Secs. 405 & 415—*Criminal breach of trust—meaning of entrustment—Cheating.*

It is cheating under Sec. 415 to fraudulently induce, by means of a deception, a person (not necessarily the owner) to deliver property. It is criminal breach of

Penal Code (Contd.)

trust when the person entrusted with property shall dishonestly convert it to his own use. The notion of a trust in the ordinary sense of that word is that there is a person in whom confidence is reposed by another who commits property to him; in other words, the confidence is freely given, and the property honestly obtained. (*Corrish, Mockett & Lakshmana Rao JJ*)

EMPEROR vs. JOHN MC. IVOR.

70 M.L.J. 635=43 M. L. W. 548=1936 M.W.N. 281=162 I.C. 592=A.I.R. 1936 Mad. 353=1936 Cr. C. 637=37 Cr.L.J. 637

Secs. 406—*Complainant giving bangles to accused—Accused agreeing to give in consideration certain gold and silver—No agreement to give identical gold and silver of which bangles were composed—Accused cannot be convicted under Sec 406 I. P. C.*

Where two bangles are given by the complainant to the accused and there is no clear indication anywhere that the agreement between the parties was that the identical gold and silver composing the ornament were to be given to the complainant, and the record is quite consistent with the supposition that property in the ornament had passed from the complainant to the accused in consideration of the latter agreeing to give certain quantities of gold and silver, though not necessarily the identical gold and silver of which the bangles were composed, the accused cannot be convicted of criminal breach of trust. (*Niamatullah & Ollister JJ.*)

BARMANAND vs. EMPEROR.

1936 A.W.R. 630=1936 A.L.J. 865=1936 Cr.C. 867=37 Cr.L.J. 1075=165 I.C. 182=A.I.R. 1936 All. 691

Sec. 408—*Criminal Breach of Trust—Accused must explain what happened to the money—Failure may justify an adverse inference.*

In a case of criminal breach of trust the accused must explain what happened to the money which was entrusted to him. It will not do for him to say that the burden of proof in a criminal case lies absolutely on the prosecution. If he fails to give any reasonable explanation the Court may be justified in drawing an inference that he misappropriated it. (*V. Bose J.*)

Penal Code (Contd)**BAPU RAO vs. EMPEROR.****1936 Cr.C. 715 = A.I.R. 1936 Nag. 160****Sec. 408—Criminal breach of trust—dishonest intention, if must exist.**

An employee was prosecuted under Sec. 408, Penal Code on the allegation that at the time of rendering accounts to his master on the termination of his services he had shown as expenditure an item withdrawn by him being the money deposited by him as security for his employment. *Held*, that on these facts, no dishonest intention could be made out on the part of the accused. It might be that he took a wrong view of his civil rights in taking away the amounts due as his security, but in the absence of a dishonest intention, he could not be convicted under Sec. 408, Penal Code. (*R. C. Mitter J.J.*)

ABDUL MAJID MIAN vs. EMPEROR.**A.I.R. 1936 Cal. 620 = 165 I.C. 720 = 1936 Cr.C. 747****Sec. 408—Charge of criminal breach of trust—court examining evidence in respect of each item of money embezzled—conviction if can be questioned.**

Where in three cases of criminal breach of trust under Sec. 408 Penal Code, the Court examined in respect of each item of money embezzled which went to make up the total amount of the sums embezzled as entered in the charge sheet in each case, *held*, that this was a method most favourable to the accused and he could not complain that he had been in any way prejudiced by the manner in which the evidence against him had been scrutinised by the Court. (*Nanavutty J.*)

KRISHNA PRIYA SARAN vs. EMPEROR.**1936 O.W.N. 607 = 164 I.C. 302 = 37 Cr. L.J. 941 = 1936 Cr.C. 935 = A.I.R. 1936 Oudh 379****Sec. 409—Prosecution failing to prove embezzlement of particular sum referred to in the charge, but proving other embezzlements—effect of.**

In a charge under Sec. 409, Penal Code, it is not open to the accused to plead in defence that the prosecution has failed to prove the embezzlement of a particular

Penal Code (Contd)

sum with which he is charged, although they might have succeeded in proving embezzlement of other sums, for such a defence amounts to no more than this that the prosecution have failed to prove the embezzlement because it is possible to explain all the circumstances against the accused by the hypothesis that the accused embezzled some other sums shortly before or after the alleged occurrence. Such a defence cannot hold good for the simple reason that if accepted would merely involve a conviction whatever hypothesis was adopted, and no prejudice can be urged by the accused for lack of charge because it was his own defence. (*Dalip Singh J.*)

GURBAKSH SINGH vs. EMPEROR.**38 P.L.R. 1157 = 162 I.C. 391 = 37 Cr.L. J. 551 = 1936 Cr. C. 992 = A.I.R. 1936 Lah. 907****Sec. 409—Peon prosecuted for criminal misappropriation of dues recovered by him—defence that amounts were handed over to master—Conviction if may be sustained.***

A canal peon was prosecuted for criminal misappropriation in respect of moneys realised by him as canal dues. The defence was that he had handed over the moneys to the authorities.

Held, the burden of proof that he had misappropriated the amounts lay entirely on the prosecution, and in the absence of any evidence to the effect, the peon was entitled to an acquittal. (*Nanavutty J.*)

ASHIQ ALI vs. EMPEROR.**1936 O.W.N. 671****Sec. 409—Accused charged with giving outsiders access to public records—Keys of the almirah containing the record found with an outsider—Accused must explain how keys passed from his possession to the possession of the outsider—Failure will justify an adverse inference.**

The accused who was in charge of records was charged with having given outsiders access to the records. Evidence showed that the keys of the almirah containing the records were in the possession of an outsider, who handed over the records to persons wanting them in consideration of money. The accused

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could give no explanation as to how the keys could pass to him.

Held, the action of the accused was covered by the second part of the definition in Sec. 406 I. P. C. and the accused could be rightly convicted. 42 I. C. 595 distinguished. (*Rowland J.*)

ABDUS SALAM vs. EMPEROR.

160 I.C. 12 = 37 Cr. L.J. 219 = 1936 Cr. C. 142 = A.I.R. 1936 Pat. 108

Sec. 409—*Moujadar undertaking by kabuliati to realise Govt. revenue and local rates and pay same into treasury, in default, money due to be released from him as arrears of rent if a lessee or farmer of the dues or agent for making collection—Money realised if property of moujadar or of Government.*

The position of a moujadar in Assam is that of a Government servant. Where therefore a moujadar stipulates to realise Government revenue and the local rates within his mauja and pay the same into the treasury on or before such date as may be fixed, there being a further condition that on failure to pay the amount due on account of any instalment, the same shall be realised from him in the same way as the arrears of rent for land, he is not lessee or farmer of the Government in respect of the moneys due from the tenants, but is merely their agent for making collections and therefore any money realised from the tenants belongs to the Government and not to him. Accordingly when any money realised from the tenants is converted by such a moujadar to his own use, the offence of criminal misappropriation as a public servant is committed. (*Cum-liffe & Henderson J.J.*)

RAMPROSAD SAIKIA vs. EMPEROR.

40 C.W.N. 1154

Sec. 409—*Criminal misappropriation—ingredients of—mere non-production, if amounts to misappropriation,*

In case of a charge of criminal misappropriation there must be something to prove dishonesty. Dishonesty may be inferred from the terms upon which the accused had the money in his possession, but except in exceptional circumstances which themselves indicate a dishonest intention, mere non-production of the money which is

Penal Code (Contd.)

rightfully in the hands of the accused, will not amount to the crime of misappropriation. (*Lort Williams & Jack J.J.*)

MANMATHA NATH SIRCAR vs. DHAT-NIGRAM UNION BOARD.

40 C.W.N. 128 = 37 Cr.L.J. 904 = 164 I.C. 279

Sec. 411—*Accused possessing bullocks, alleged to be stolen producing receipts showing purchase—accused, if guilty of offence under Sec. 411.*

The accused who was charged with receiving bullocks as stolen property produced a receipt in his name showing purchases of bullocks at a fair. There was evidence to show that the bullocks had been in his possession for several months. *Held*, that under the circumstances the presumption to be raised under Sec. 114, Evidence Act, had been sufficiently rebutted and the accused being a bona-fide purchaser of the bullocks was not guilty of an offence under Sec. 411, Penal Code. (*Nanavutty J.*)

BALESWAR vs. EMPEROR.

1936 O.W.N. 668 = 165 I.C. 97 = 37 Cr. L.J. 907(1) = 1936 Cr. C. 989 = A. I. R. 1936 Oudh 380

Sec. 411—*Accused found in possession of common articles of use—conviction for possessing stolen property bad, unless marks of identification are found.*

The accused were found in possession of several common articles of use. Such articles had also been stolen some time back.

Held, in the absence of special marks of identification of the articles, the accused could not be convicted of receiving or retaining possession of stolen articles (*Coldstream J.*)

PHUL KHAN vs. EMPEROR.

38 P.L.R. 965

Sec. 411—*Accused found in possession of articles belonging to several persons and burgled several times, offence, one or several.*

An accused was found in possession different articles, which belonged to different persons and were stolen at different times.

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Held, the accused could not be charged differently (*Currie J.*)

CHANAN SINGH vs. EMPEROR.

163 I.C. 132 = 37 Cr.L.J. 752

Sec. 411—*Finding of stolen property in house occupied by two brothers evidence that one of the brothers visited by criminal tribes—presumption that other brother had knowledge of stolen property.*

There was a theft in the house of one B of a woollen coat, and in the house of one G of a torok. The articles were recovered from the house of the two brothers. Evidence showed that the younger brother was visited by members of criminal tribes, and that he had a dominating possession. The elder brother was content with a secondary position in the family.

Held, the mere fact that the elder brother had knowledge that his younger brother was visited by criminal tribes raised a suspicion against him that he had knowledge of the stolen goods but was not sufficient to convict him. (*Varna J.*)

DEONANDAN JHA vs. EMPEROR.

1936 Cr.C. 900(1) = 37 Cr.L.J. 1123 = A.I.R. 1936 Pat. 534 = 165 I.C. 230

Sec. 411—*Offence under the section—Mere suspicion if sufficient.*

The word "belief" in Sec. 411, Penal Code is much stronger than the word "suspicion" showing that the circumstances were such that a reasonable man must have felt confidence in his mind that the property which he was dealing with was stolen property, and it is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiries to ascertain whether it had been dishonestly acquired. (*Nanvutty J.*)

BIAGGAN vs. EMPEROR.

11 Luck. 70

Sec. 411—*Stolen property found in house—house occupied by accused along with other persons—Conviction of accused if justified.*

In no circumstances can a man be convicted of being in possession of stolen property if there are inmates of the house other than himself. All that has been laid down is that no person can be convicted if it is

Penal Code (Contd.)

doubtful whether he or some other person had guilty knowledge that the property was in the house occupied by him and others. (*Allsop J.*)

HABIB vs. EMPEROR.

1936 A.L.J. 511 = 1936 A.W.R. 383 = 1936 Cr.C. 500 = 37 Cr.L.J. 813 = 162 I.C. 964 = A.I.R. 1936 All. 388

Sec. 411—*Dishonest retention or receipt of stolen property—an essential ingredient.*

It is only a dishonest retention or receipt of stolen property that constitutes an offence under Sec. 411 I.P.C. (*Pandrang Row J.*)

ABDUL GANI SAHED IN RE.

59 Mad. 995 = 71 M.L.J. 536 = 1936 M.W.N. 985 = 44 M.L.W. 558 = 165 I.C. 387 = 37 Cr.L.J. 1150

Sec. 411—*Receiving stolen property—essential ingredient of offence.*

To establish the case against an accused charged with receiving stolen property, it is not only necessary to prove that he was in possession of certain articles, but also to prove that such articles had recently been stolen. (*Harries & Rachhpal Singh JJ.*)

EMPEROR vs. MATHURI & ORS.

1936 A.W.R. 1 = 1936 A.L.J. 578 = 1936 Cr.C. 401 = 37 Cr.L.J. 794 = 163 I.C. 253 = A.I.R. 1936 All. 337

Sec. 411 & 412—*Finding stolen property from under tree in field—accused cannot be said to be in exclusive possession—Meaning of the word possession.*

The accused produced stolen property from under a tree in a field. He was charged under Sec. 411 and 412 I.P.C. for being in charge of and receiving stolen property.

Held, the accused could not be convicted under Sec. 411 or 412 I.P.C. as he was not in possession of the stolen property. The possession contemplated by the section was exclusive possession of the accused, and as any body can have access to a field, the accused cannot be said to be in exclusive possession. (*Nanavutty J.*)

RAM AUTAR vs. EMPEROR.

37 Cr.L.J. 454 = 161 I.C. 271 = 1936 O.W.N. 295

Sec. 412—*Onus of proving guilty knowledge of accused.*

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In a charge of receiving stolen property under Sec. 413, Penal Code, the onus of proof never passes to the accused, but the prosecution must prove his guilty knowledge. (*Lori Williams & Jack JJ.*)

DAUD SHAIKH vs. KING; EMPEROR.

40 C.W.N. 159

Secs. 415, 419 & 468—*Personating candidate at University examination and writing answer paper for him if constitutes offences under the section—certainty of candidate's failure if makes difference.*

Where on certain days of a University examination the accused falsely represented himself to be a particular candidate and wrote answer paper on behalf of and in the name of the latter, held, that there was cheating although the candidate personated could not have passed, because of his failure in papers answered by himself, and therefore the offences of cheating by false personation and forgery for the purpose of cheating were established 12 Mad. 151, 28 Mad. 90, 15 All. 210, followed; 25 Mad. 726 dissented from. (*Guha & Bartley JJ.*)

ASWINI KUMAR GUPTA vs. EMPEROR.

43 C.W.N. 956 = 165 I.C. 505—37 Cr. J. 1156(2) = 1936 Cr. C. 855 = A.I.R. 1936 Cal. 403

Sec. 420—*Five persons prosecuted for conspiracy to cheat—Acquittal of four persons if can affect conviction of the fifth for cheating.*

Where five persons are alleged to have combined to deceive another, and four of them are given the benefit of doubt, the position of the remaining accused who is found guilty of deception is not affected. The participation of the others being eliminated, he is the only person who could be responsible for deception which ex-hypothesi did take place. Accordingly, the conviction of the fifth accused is not vitiated by the fact that four of his co-accused who are said to have conspired with him are acquitted. (*Niamatullah J.*)

JAILAL vs. EMPEROR.

1936 A. L. J. 413 = 1936 A.W.R. 249 = 1936 Cr. C. 421 = 37 Cr. L.J. 697 = A.I.R. 1936 All. 357

Sec. 420—*Decree-holder receiving decretal money from judgment-debtor out of Court—*

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decree-holder subsequently applying for execution—absence of evidence of dishonest intention—decree-holder, if guilty of cheating.

Where the decree-holder received a sum of money from the judgment-debtor and agreed that no further liability under the decree would attach to the judgment-debtor but subsequently applied for execution against him and the judgment-debtor thereupon filed a complaint against the decree-holder in the criminal Court on a charge of cheating, held that in the absence of evidence to show that at the time when the decree-holder received the money, he had any dishonest intention to cheat the complainant, it could not be said that the decree-holder cheated the complainant by dishonestly inducing him to part with his money. At the most, the decreeholder was guilty of a breach of faith, which could only give rise to a civil action. (*Nanavutty J.*)

RAM BHARASA SINGH vs. EMPEROR.

1936 O.W.N. 754 = 164 I.C. 144 = 1936 Cr. C. 981 = 37 Cr. L.J. 907 = A.I.R. 1936 Oudh 372

Sec 420—*'Cheating'—depends on the successful inducement of the person cheated.*

The question whether an offence has been committed under Sec. 420 does not depend upon the accused's success in swindling of the amount of times that he has managed to obtain property by cheating but depends in each individual case, on the successful inducement of the person cheated, (*Cunliffe & Henderson JJ.*)

GIRIDHARI LAL vs. EMPEROR.

1936 Cr. C. 935 = 165 I. C. 817 = A. I. R. 1936 Cal. 678

Secs. 420, 120-B—*Speculative scheme in which rules are clearly set forth if may be held to be dishonest.*

The accused were the Managing Director of a joint stock company carried on under the name and style of the Bengal Industrial Loan Co Ltd. The loan rules of the company contemplated different classes of loans, and the scheme on which the prosecution was started was as follows: The applicant for the loan was to pay an admission fee and make a deposit. He was required to secure two co-members or secondaries who were

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also required to pay admission fees and the deposit called the opening deposit. After payment by the secondaries, the company was to advance loan up to a fixed maximum to the original applicant within a fixed period of 45 to 60 days. After the two co-members had paid admission fees and deposit, the original applicant was to get a refund of his opening deposit; the co-members or secondaries were in the same way to get loans from the company on their securing two co-members or secondaries each. If however the original applicant failed to secure two co-members within a week of his application, he was on sending a notice to the company to get a refund of his deposit money with interest at the rate of six per cent per annum within 180 days of the date of receipt of notice by the company.

Held, the scheme was of 'snowball' nature, but the literature and the loan rules could not be regarded as misleading and deceptive. All the conditions of the scheme were set out in black & white. There was no room for misunderstanding. The accused could not be held responsible for the starting and carrying through a scheme of such fraudulent nature so as to attract the operation of the penal law against the accused. (*Guha & Bartley JJ.*)

JATINDRA NATH SARCAR vs. EMPEROR.

1936 Cr.C. 667 = A.I.R. 1936 Cal. 440

Sec. 401.—*Right to cut tree for charcoal—movable property.*

A contract for cutting trees to be converted into charcoal is an agreement relating to moveable property. (*Barlee & Divatia JJ.*)

MANCHERSHA ARDESHIR DEVI-
ERWALA vs. ISMAIL IBRAHIM PATEL &
ORS.

60 Bom. 706 = 38 Bom. L.J. 168 = 37 Cr.
L.J. 577 = 1936 Cr.C. 359 = 162 I.C. 310 =
A.I.R. 1936 Bom. 167

Secs. 421, 423.—*Fraudulent disposition by insolvent of movable property, even when situate in foreign state if an offence.*

Movable property in a foreign state belonging to the insolvent would ordinar-

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ly vest in the receiver in insolvency, and the latter can take steps to recover it through the insolvent or otherwise so as to make it available and distributable among his creditors. So a dishonest or fraudulent transfer, removal or concealment or delivery of such property by the insolvent without adequate consideration so as to prevent its distribution among creditors would make it an offence under Sec. 421 even when the property is situate in a foreign state, (*Barlee & Divatia J.*)

MANCHEKCHA ARDESHIR DEVIER-
WALA vs ISMAIL IBRAHIM, PATEL

60 Bom. 706 = 38 Bom. L.J. 168 = 37 Cr.
L.J. 577 = 1936 Cr.C. 359 = A.I.R. 1936
Bom. 167

Sec. 441—*Accused in possession of lands for 8 years—Lands thereafter distributed among other villagers under orders of Magistrate—Accused returning to possession again if can be convicted for offence of criminal trespass.*

The accused had been in possession and had been cultivating an area of alluvial land for a period of more than 8 years. Subsequently a body of Thamas under orders of the Subdivisional Magistrate distributed the land amongst certain villagers thereby dispossessing the accused. An year later the accused with his servants returned to possession again and were thereupon charged with the offence of criminal trespass. *Held*, that the prosecution was unsustainable because the offence committed by the accused was clearly of a civil nature being in exercise of a bonafide claim of possession of the lands. The remedy open to the persons dispossessed was not a criminal prosecution against the accused but a suit under Sec. 9, Specific Relief Act. (*Dunkley J.*)

MAUNG CHAN THA & ORS. vs. EM-
PEROR.

A.I.R. 1936 Rang. 116 = 162 I.C. 993 =
37 Cr.L.J. 527 = 1936 Cr.C. 183

Sec. 441—*Person lawfully entering house if can be convicted of trespass for subsequent action.*

To commit the offence of house trespass as to commit any other offence there must be *mens rea* in respect of the offence that may exist where the entry is unlawful. But

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where the entry is lawful, whatever offence may be committed, it is independent of the question of the entry into the house or of remaining there: there is no *mens rea* in respect of such remaining. Therefore where a person enters another's house at the request of the latter and subsequently a quarrel breaks out between them, the person entering the house cannot be prosecuted for house trespass. (*Grille J.*)

AHMED KHAN vs. EMPEROR.

A.I.R. 1936 Nag. 176=1936 Cr.C. 718

Sec. 441—Entry made for asserting supposed legal right, if amounts to criminal trespass.

Where the act of trespass alleged is done not with intention to commit an offence or to intimidate, insult or annoy any person in possession of property, but is done with the intention of asserting a supposed legal right, it does not amount to criminal trespass within the meaning of Sec. 441, Penal Code. (*Beaumont C. J. & Wadia J.*)

EMPEROR vs. MRS. S. D. CUNHA.

59 Bom. 738=A.I.R. 1936 Bom. 15=37 Bom. L.R. 880=160 I.C. 515=1936 Cr.C. 64

Sec. 441—Trespass—Bonafide entry if can amount to criminal trespass.

The essence of criminal trespass is the intention to do one or other of the acts specifically referred to in Sec. 441, Penal Code. If such is not the intention of the person accused of the offence of criminal trespass, but his entry into or upon the property in dispute was with intent to assert or exercise a bonafide claim of right, such entry may or may not amount to civil trespass but will certainly not amount to criminal trespass punishable under Sec. 447, Penal Code. (*Niamatullah J.*)

SRINARAIN & ANR. vs. EMPEROR.

1936 A.L.J. 203=160 I.C. 197=1936 Cr.C. 174=37 Cr.L.J. 244=A.I.R. 1936 All. 164

Secs. 441 & 447—Essentials of criminal trespass—entry with intent to assert bonafide claim of right does not amount to criminal trespass.

The essence of criminal trespass is the intention to do one or other of the acts

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specifically referred to in Sec. 441, I. P. C. Where the accused made his entry into or upon the property in dispute with intent to assert or exercise a bonafide claim of right, such entry did not amount to criminal trespass punishable under Sec. 447 I. P. C. (*Niamatullah J.*)

SRINARAIN vs. EMPEROR.

1936 A.W.R. 114=A.I.R. 1936 All. 146=160 I.C. 167=37 Cr.L.J. 244=Cr.C. 167

Sec. 447—Criminal trespass—intention to cause annoyance—essential ingredient of offence.

The intention to cause annoyance is an essential ingredient in criminal trespass. It is not sufficient to show that the action of the accused necessarily resulted in annoyance to the owner of the land and caused damage to him, when there is no intention to cause annoyance by the action complained of. (*Mackpherson J.*)

BHUPAT MANDAL vs. KAKTIC JHA.

16 P.L.T. 913=1936 Cr.C. 244(1)=161 I.C. 705(1)=A.I.R. 1936 Pat. 170

Sec. 447—Sons of judgment debtor re-entering property of father, possession of which has been delivered to decree-holder by court—if guilty of criminal trespass.

The sons of judgment debtor re-entered upon the land of their father, possession of which had already been delivered to the decree-holder through court, and plough the fields.

Held, the action of the sons of the judgment-debtor amounted to criminal trespass. Possession of the land for a sufficient length of time to sow crops themselves cannot be said to create any title to justify to remain in possession of the land. (*Grille J.*)

SETH THAKURDAS vs. NARAYAN & ORS.

A.I.R. 1936 Nag. 192

Secs. 457 & 460—Theft, whether essential ingredient of an offence under the sections.

Theft frequently follows an offence under Sec. 457, Penal Code, but it cannot be said that it is an essential ingredient of that offence. All that is required to complete the offence under Sec. 457 is that the burg-

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lar or house-breaker by night should have an intention to commit theft. It does not matter whether his intention to commit theft has been actually carried out. (*Harries & Raghpal Singh JJ.*)

EMPEROR, vs. MATHURI & ORS.

1936 A.W.R. 1 = 1936 A.L.J. 518 = 1936 Cr.C. 401 = 37 Cr.L.J. 794 = 163 I.C. 253 = A.I.R. 1936 All. 337

Sec. 460.—*Fatal attack caused by accused on inmate of house in the course of abducting woman at dead of night — accused guilty under Sec. 460, and not under Sec. 302-34 or 304.*

The accused surreptitiously entered the house of the deceased with a view to abduct his son's wife, and in the course of resistance inflicted such fatal injuries on the deceased, that his skull was fractured, and death resulted ultimately.

Held, that in view of the fact that the preliminary intention of the culprits was to forcibly take away Mt. Fatima, and they had with themselves dangs and chavis to use, in case obstruction was offered to them it could not be said that they had an intention of committing culpable homicide amounting to murder or not amounting to murder. The proper section under which the accused could be charged and convicted was under Sec. 460, and not under Sec. 302 or 304-I. I. C. (*Tekchand & Dalip Singh JJ.*).

MOHAMMADA & ORS. vs. EMPEROR.

38 P.L.R. 1150 = A.I.R. 1936 Lah. 911 = 165 I.C. 874 = 1936 Cr.C. 1009

Secs.—463, & 465—*School teacher altering dates in diary to disguise fact that diary had not been kept in certain dates — guilty of offence under Sec. 465, Penal Code.*

Where a school teacher altered the dates in a diary required to be kept regularly with a view of disguising the fact that on certain dates the diary had not been kept, which default entailed a penalty in the form of loss of pay, *held*, that the teacher was in the circumstances, if not actually guilty of dishonesty had at any rate an intention to obtain an advantage to himself and a corresponding disadvantage to the school authorities and she was therefore guilty of an offence under Sec. 465, Penal Code, 28 Mad. 90 relied on. (*Parker J.*)

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MG, KO GYI vs. EMPEROR.

A.I.R. 1936 Rang. 380 = 37 Cr.L.J. 1059 = 1936 Cr.C. 782 = 164 I.C. 1088

Sec. 467.—*Accused not denying document and signature on the document to be in his handwriting—Expert's evidence that handwriting is of the accused—conviction proper—sentence of five year's imprisonment not severe.*

The alleged forged document is purported to be in the handwriting of the accused and he never definitely denied it to be in his hand-writing. When questioned he stated that the signature on the document appeared to be like his signature. The evidence of the expert was the writing was in the hand of the accused.

Held, the accused could be properly convicted, and sentenced to five year's rigorous imprisonment which was not too severe. (*Zia-ul Hassan J.*)

MAHAMMAD SIDDIQ ALI vs. EMPEROR.

1936 O.W.N. 1066 = A.I.R. 1936 Oudh 381

Sec. 471.—*Cognisance of offence under—cannot be taken by Magistrate without complaint from court—when no section mentioned by complainant court—effect.*

No court can take cognisance of an offence except upon the complaint of a court. Where a court complained of facts which constitute an offence under Sec. 471, but omits to refer specifically to the number of the section there is nothing to prevent the Criminal court from holding on those facts that an offence under Sec. 471 has been made out. (*King J.*)

HAMPANA GOWD AND ANR vs. EMPEROR.

70 M.L.J. 109 = 43 M.L.W. 226 = 1935 M.W.N. 1346 = 37 Cr.L.J. 421 = 1936 Cr.C. 268(2) = A.I.R. 1936 Mad 280 = 161 I.C. 196

Sec. 477-A.—*Difference between servant and agent.*

An agent has the power to act on his own initiative, and that is the ordinary mark of difference between a servant and an agent. (*Baguley J.*)

E. A. MORLEY vs. EMPEROR.

1936 Cr.C. 631 = 37 Cr.L.J. 927 = 164 I.C. 369 = A.I.R. 1936 Rang. 299

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Sec. 471—Production of forged document at the instance of Court, if an offence.

The use of the document contemplated by Sec. 471, Penal Code, must be a voluntary one and not the mere production of a document in compliance with an order of the Court. Where a suit is filed on a pronote but the receipt is not filed along with the plaint but is subsequently put in on the insistence of the Court, the plaintiff cannot be convicted of the offence under Sec. 471, Penal Code for having produced a forged document. (*Mulla J.*)

KEDARNATH vs. EMPEROR.

36 A.W.R. 1453=37 Cr.L.J. 46

Sec. 32—Accused charged with using a trade-mark described by a name already used by the complainant—Physical resemblance between the two marks and not the name, which constitutes an offence.

The accused are charged with using a trade-mark which cannot be described with any other word than 'Sovereign mark' by which word the trade-mark of the complainant is known.

Held, the fact that one mark might be known in the market under the same name as another was not necessarily a violation of rights of the owner of the first mark. There must be some inherent similarity in the marks themselves which justifies the use of the same name for both (*Dunkley J.*)

ABDUL SAKUR vs. EMPEROR,

1936 Cr.C. 184=37 Cr.L.J. 528=161 I.C. 107=A.I.R. 1936 Rang. 96

Sec. 482—Trade-marks — imitation of—mere colourable imitation no offence—imitation must be such that unwary customer may not be able to distinguish the difference—proper sentence.

To constitute an offence under Sec. 480 it is enough that there should be similarity as an unwary customer may not be able to distinguish the one from the other, especially when he sees the one without having the other before him. The question being one of fact, the Court must come to its own conclusion after having placed itself in the position of an unwary customer. The question is

Penal Code (Contd)

not as to whether any one has been deceived in fact, but whether an average customer can be deceived. In all cases when the offence is proved, the measure of punishment should be the damage caused in the case. A. I. R. 1934 Mad. 211 followed.

GIRIDHARILAL MARWARI vs. EMPEROR.

17 P.L.T. 367=1936 Cr.C. 950=165 I.C. 748(2)=A.I.R. 1936 Pat. 579

Sec. 483—Jurisdiction of criminal courts to deal with disputes over trade mark and commercial designs.

The aid of the criminal courts in disputes over trade-mark and commercial disputes can be invoked only in simple and clear cut cases where a very speedy relief is required by the prosecution. In all cases where complicated matters of registration, abandonment of user and so on are concerned, it is very much better that the dispute should be referred to the Civil Courts. (*Ounlife & Henderson JJ.*)

ASHRUSOSH DAS vs. KESHAB CH. GHOSH

A.I.R. 1936 Cal. 488=1936 Cr.C. 714

Sec. 494—"Marry" meaning of.

The word "Marry" in Sec. 494, Penal Code means going through a form of marriage whether the marriage should prove in fact legal and valid or illegal and invalid. 45 Cal. 641 & 11 Lah. 178 relied on. (*Pollock, J.C.*)

EMPEROR vs. SONI & ORS.

19 N.L.J. 44=A.I.R. 1936 Nag. 13=159 I.C. 835=1936 Cr.C. 35=37 Cr.L.J. 161

Sec. 494—Offence of bigamy, if committed where the second marriage was not in proper form.

In a prosecution for bigamy under Sec. 494, Penal Code, the prosecution has merely to show that the accused went through a form of marriage; for the word "marry" in that section means going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. (*Pollock A. J. C.*)

LOCAL GOVT. vs. SONI.

159 I.C. 555=37 Cr.L.J. 161=1936 Cr.C. 35=A.I.R. 1936 Nag. 13

Penal Code (Contd.)**Sec. 498—"Detain"—Meaning of.**

In order to establish detention under Sec. 493 of Cr. P. Code, it is not necessary to prove that the woman was being kept against her will but there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her husband. (*Cunliffe & Henderson JJ.*)

PRITHI MISSIR vs. EMPEROR.

40 O.W.N. 996 = 1936 Cr.C. 684 = A.I.R. 1936 Cal. 450

Sec. 498—*Uncle with whom a married girl goes away if can be convicted under Sec. 498.*

Where the person with whom a married girl is alleged to have gone away is the uncle of the girl, he cannot be guilty of an offence under Sec. 498, Penal Code. (*Addison J.*)

ABDUL AZIZ vs. THE CROWN.

38 P.L.R. 570

Sec. 499—*Accused charged with defamation by imputing unchastity to a married woman—justification must be proved by accused.*

The accused was charged under Sec. 499 I. P. C. with having defamed the complainant by imputing unchastity to a married woman. To support a plea of justification, the accused must prove the truth of his allegations. It will not do to call upon the complainant to prove the allegations false. (*Bose J.*)

SUKHDYAL vs. MT. SARASWATI.

A.I.R. 1936 Nag. 217

Sec. 499.—*Burden of proving exception, how far lies on the accused.*

In a case under Sec. 499, Penal Code, the burden lies on the accused to prove an exception, but he may do so by relying on any of the facts brought out in the case even when they did not appear in his own statement or defence evidence. Where, however, the Court finds on the prosecution evidence itself that the accused is entitled to the benefit of a certain exception, it should give the accused that benefit even though he may not have relied on the exception. (*Gruer J.*)

BHAD DEO CHHOTELAL SUNAR vs. EMPEROR.

Penal Code (Contd.)

I.L.Q. 1936 Nag. 85 = 164 I.C. 928 = 37 Cr.L.J. 1035 = 1936 Cr.C. 621 = A.I.R. 1936 Nag. 110

Sec. 499—*Offence of defamation—Essentials.*

In a trial for defamation, what the prosecution has to establish is not that the accused have indulged in exaggeration or even falsehood in respect of their own position and importance, but that the imputation made by them is calculated to harm the reputation of the complainant. (*Niamatullah, J.*)

GANDARAM & ANR, vs. EMPEROR.

1936 A.L.J. 66 = 1936 A.W.R. 164 = 160 I.C. 230 = 37 Cr.L.J. 255 = 1936 Cr.C. 171 = A.I.R. 1936 All. 143

Sec. 499, Excep. (9)—*Election campaign—words calculated to give publicity to person's position in the profession if constitutes defamation.*

Where in the course of an election campaign the accused issued a poster against his rival candidate which was titled "the hollowness of Mr.—'s capacity as a barrister has been exposed," held, that the accused had no justification whatever in dragging his rival's position as a barrister into the lime-light of publicity in a language which amounted to a serious aspersion upon his professional status and was calculated to lower him in the eyes of the public as a barrister. The profession of a barrister is a highly honourable one and to say that the position of a certain barrister is hollow and to expose the same in a poster broadcast through the length and breadth of the constituency does not afford the protection laid down in Excep. 9 to Sec. 499, Penal Code. (*Agha Haidar J.*)

PANNA LAL vs. EMPEROR.

164 I.C. 809 = 37 Cr.L.J. 1033 = 1936 Cr.C. 244(2) = A.I.R. 1936 Lah. 294

Sec. 505 (c)—*Scope of —section, if applies to speech suggesting violent treatment of black legs in case of strike.*

Sec. 505(c), Penal Code, is intended to deal with real and not imaginary communities and classes; and it is directed towards preventing clashes between such rival communities. Accordingly, when a speech delivered before any strike has taken place suggests violent treatment of "black legs" in the event of a strike, Sec. 505 (c) does

Penal Code (Contd)

not apply. The other requirements being satisfied, such a speech may come under Sec. 117, Penal Code. (*Cunliffe & Henderson JJ.*)

SHIBNATH BANNERJI vs. EMPEROR.

40 C.W.N. 1218

POLICE ACT (V OF 1861).

Sec. 31—Order prohibiting a legal act simply because police officer apprehends that a breach of the peace would be committed by other persons—*Legality.*

Sec. 31, of the Police Act does not empower every officer whether a Police Inspector or a constable, to issue orders prohibiting the doing of otherwise legal acts simply because he apprehends that a breach of the peace would be committed by other persons ordered not to do the legal acts proceeded in doing them. In other words, it does not authorise the Police officer to issue an order which a Magistrate might have issued under Sec. 144, Cr. P. Code, to refrain from doing a perfectly legal act. (*Sulaiman C. J. & Bennet J.*)

JASNAMI & ORS. vs. EMPEROR.

1936 A.W.R. 424=1936 A.L.J. 579=
163 I.C. 866=37 Cr.L.J. 866=1936 Cr.
C. 686=A.I.R. 1936 All. 534

Sec. 42—Scope of the section.

Sec. 42, Police Act applies to actions brought for anything done or intended to be done under the provisions of the Police Act or under the general police power given by the Act. It does not refer to action brought for anything done under the Cr. P. Code. (*Pollock A. J. C.*)

HIRALAL & ANR. vs. RAMDULARE.

A.I.R. 1935 Nag. 237

PRACTICE.

Practice—Prohibitory order on insolvent not observed—form of order defective—criminal liability.

It is important that notices and orders should be in proper form, and a failure to scrutinise and correct them may well cause subsequent difficulties in the administration of justice. Where a prohibitory order on an insolvent was rather defective in form and

Practice (Contd)

did not give any notice of the admission of any insolvency petition to the insolvent, the insolvent cannot be fixed with liability in a criminal case. (*Gruer, J.*)

S. A. SANTIAGO vs. EMPEROR.

A.I.R. 1936 Nag. 237

PRESS (EMERGENCY POWERS) ACT (XXIII OF 1931).

Secs. 2 (1) & (6)—Sub-sections are not mutually exclusive—same document which is a book can be a news sheet.

Sub-Secs. (1) & (6) in Sec. (2) are mutually exclusive and pamphlets which come within Sub-Sec. (1) as 'books' may also come under Sub-Sec. (6) as news sheets. (*Beasley C. J. & Gentile J.*)

JONNALAGADDA vs. EMPEROR.

A.I.R. 1936 Mad 835

Sec. 4 (1) (d)—'Pamphlet' directed against the 'rich'—eg. Zamindars, mill-owners and landowners—'the rich' is a definite ascertained class.

Where a pamphlet is directed against the rich, who are described as the Zamindar mill-owners and land owners, they form a sufficient ascertained class to satisfy the requirements of this Act. (*Beasley C. J. & Gentile J.*)

JONNALAGADDA RAMALINGAYYA vs. EMPEROR.

A.I.R. 1936 Mad. 835

PRIVY COUNCIL.

Criminal appeal—Privy Council, when will interfere.

The Privy council is not a court of criminal offence and will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done, though where real injury has been done by the prosecution or the court to an accused person by an improper admission of documents, the absence of objection by counsel for the accused will not excuse it. (*Lord Roche.*)

INAYAT KHAN vs. EMPEROR.

17 Lah. 488=38 P.L.R. 824=40 C.W.
N. 1101=63 C.L.J. 486=38 Bom. L.R.
764=1936 M.W.N. 742=44 M.L.W.
125=1936 A.W.R. 781=37 Cr.L.J. 833
=1936 Cr.C. 658=A.I.R. 1936 P.C. 199,

Privy Council (Contd)

Criminal appeal—trial exhibiting neglect of fundamental rules necessary for protection of prisoners—Privy Council, if will interfere.

Where a criminal trial was so conducted as in three separate respects viz., the exclusion of the statements, restriction of the address by counsel and the neglect of the rule requiring corroboration, to exhibit a neglect of fundamental rule of practice necessary for the due protection of prisoners and the safe administration of criminal justice, held, that the privy council was justified in interfering. (*Sir, Sidney Rowlett*.)

MAHADEO vs. EMPEROR.

40 C.W.N. 1164=38 Bom. L.R. 1101=
1936 M.W.N. 889=44 M.L.W. 253=
1936 A.W.R. 741=1936 A.L.J. 869=
37 Cr. L. J. 914=1936 Cr.C. 757=163
I.C. 601=A.I.R. 1936 P.C. 442

Special leave to appeal when granted in a criminal case.

The privy council, not being a court of criminal appeal, will not except in the most exceptional circumstances, entertain an application for special leave to appeal in a criminal case. It will, however, grant such leave, when there has been, with reference to a section of the Criminal Procedure Code, a difference of opinion in the High Courts in India, which ought to be resolved to remove future doubt as to the law declared by that section. (*Lord Blanesburgh*.)

NAZIR AHMAD vs. EMPEROR.

1936 A.W.R. 754=17 P.L.T. 593=38
Bom. L.R. 698=38 P.L.R. 802=44 M.L.
W. 213=1936 Cr.C. 752(1)=A.I.R.
1936 P.C. 253(1)

Criminal case—leave to appeal when may be allowed—Royal prerogative if still exists.

The Board cannot give leave to appeal where the ground suggested could not be sufficient ground for the Board to grant leave to appeal. In considering an application for leave to appeal or an appeal itself the Court would not attempt to usurp, however remotely, the function of the jury, but will grant leave only when it is of opinion that there has been a violation of elementary principles of justice resulting in grave and substantial injustice.

There is no Order in Council, charter, or other instrument of authority of which it

Privy Council (Contd)

can be inferred that the King's prerogative to allow an appeal, if so advised has been taken away in criminal matters. (*Lord Maughum*.)

DANISH ROMAIN REUEUF vs. ATTORNEY GENERAL.

A.I.R. 1936 P.C. 160

Criminal Trial—Leave to appeal if may be granted on ground of mistake of law.

Their Lordships of the Judicial committee of the the Privy Council do not sit as a Court of Criminal appeal; the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. (*Viscount Heysam*.)

ATTEGALLE & ANR. vs. THE KING.

160 I.C. 450=37 Cr L.J. 628=1936 Cr.
C. 623=38 Bom. L. R. 700=44 L. A. 88
=1936 A. L.J.=38 P.L.R. 789=1936 M.
W.N. 653=1936 A.W.R. 750=71 M. L.J.
321=A.I.R. 1936 P.C. 169

Order of courts overseas imposing penalty for contempt of court—Privy Council, if can give leave to appeal.

It is competent to His Majesty in council to give leave to appeal and to entertain appeals against orders of the Courts overseas imposing penalties for contempt of court. In such cases the discretionary power of the Board will no doubt be exercised with great care. Acts which amount to contempt of court, are quasi criminal acts, and orders punishing them, should generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well known principles on which leave to appeal in criminal cases is given. (*Lord Atkin*.)

ANDRE PAUL TERENCE AMBARD vs. ATTORNEY GENERAL OF TRINIDAD & TOBAGO.

40 C. W. N. 801=64 C.L.J. 36=38 Bom.
L.R. 681=71 M.L.J. 665=44 M.L. W.
15=1936 M.W.N. 619=1936 A.W.R.
600=1936 A.L.J. 671=38 P.L.R. 541
—162 I.C. 92=A.I.R. 1936 P.C. 141

PROCEDURE.

Solicitor for accused requiring prosecution to produce previous statements by accused and witnesses, if improper—accused, if entitled to documents recording such statements even when they are admitted and their substance given in evidence in Court.

Privy Council (Contd.)

There is nothing improper in solicitors for the accused calling upon the prosecution to produce all previous statements made by the accused and the prosecution witnesses. Even where a witness, in his cross-examination in Court, admits having previously made a different statement and gives the substance thereof, the accused is entitled to have the documents for the purpose of comparison *in extenso* with the oral evidence and an examination of the circumstances under which the statements of the witnesses changed their purport. Where such documents are refused, there is a mistrial. (*Sir, Sidney Rowlatt.*)

MAHADEO vs. EMPEROR.

43 C.W.N. 1164=1936 A.W.R. 741
=1631 C. 681=1936 Cr. C. 757
=37 Cr.L.J. 914=1936 M.W.N. 889=
38 Bom. L.R. 1101=44 L.W. 258=1936
A.L.J. 969=A.I.R. 1936 1936 (P.C.)

PUBLIC GAMBLING ACT (III OF 1866).

As amended in 1929—application of the Act to Sadar Bazar Ambala Cantonment.

The public Gambling Act. does not apply to the Sadar Bazar, Ambala Cantonment. (*Abdul Rashid, J.*)

LACHMI CHAND vs. THE CROWN.

38 P.L.R. 432

Sec. 1 (as amended by Act, III O.P.C. of 1927)—‘Common gaming house’—meaning of.

The definition of “common gaming house” in Sec. 1 of the Public Gambling Act as amended by C. P. Act, III of 1927, falls under two heads according to the nature of the gaming. The first head includes gaming on the market price of cotton and other commodities stocks or shares and on the occurrence or non-occurrence of rain, etc. In these cases any place in which such gaming takes place or where instruments of gaming are kept or used is termed a common gaming house. But in the case of any other form of gaming, the definition requires that the place should be one in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using, or keeping such house or place. (*Gruet J.*)

CHHABILAL & ORS. vs. EMPEROR.

162 I.C. 268=37 Cr.L.J.=586=1936 Cr.
C. 692=A.I.R. 1936 Nag. 138

Public Gambling Act (Contd.)

Secs. 3 & 4—Accused not proved to be habitual frequenter of the particular site where the gambling is carried on—conviction under Sec. 3, if legal.

Sec. 3 Public Gambling Act, contemplates a more serious offence than Sec. 4 of the Act, as will appear from the different punishments provided for offences under the two sections. Sec. 3 is evidently aimed at the keeper of a gaming house or other person who habitually comes within the same category. In the case of a public place used as a gaming house, Sec. 3, would apply to a man who habitually uses that spot, has his regular seat or stand there but not to a casual gambler who is simply caught on one occasion gambling in a public place. (*Gruet J.*)

BAPULAL vs. EMPEROR.

162 I.C. 232=1936 Cr. C. 559=I.L.R.
1936 Nag. 89=37 Cr. L. J. 588=A.I.
R. 1936 Nag. 78

PUNJAB EXCISE ACT (I OF 1914)

Sec. 61—Offence of possessing illicit liquor, how constituted.

The accused was charged with possessing illicit liquor. He admitted recovery of the liquor from a cowshed in his house, but urged it was planted by his partner, to get him into trouble. The house was not possessed by him exclusively.

Held, the accused could not be convicted as, to constitute criminal liability possession must be actual and not constructive. (*Currie J.*)

SUNDAR SINGH & ORS. vs. THE CROWN.

38 P.L.R. 1059=164 I. C. 435=37 Cr.L.
J. 939=1936 Cr. C. 768=A.I.R. 1936
Lah. 758

PUNJAB MUNICIPAL ACT (III OF 1911)

Sec. 3 (5) (a)—Repairing walls of a shed, if constitutes material alteration.

The repairing of the walls of a shed and the renewing the roof thereon does not amount to “material alterations” within the meaning of Sec. 3 (5) (a), Punjab Municipal Act. (*Skemp J.*)

NEW DELHI MUNICIPAL COMMITTEE vs. RAM BAL.

38 P.L.R. 886=37 Cr.L.J. 935=1936
Cr.C. 719=164 I.C. 268=A.I.R. 1936
Lah. 702

Punjab Municipal Act (Contd)

Secs. 81 & 195—Committee applying to recover money claimable under Sec. 195—Magistrate, if can enquire into the legality of the order of the committee.

A Magistrate, to whom an application is made by a Municipal committee under Sec. 81 of the Punjab Municipal Act for recovering an amount claimable under provisions of Sec. 195 of the Act, is not entitled to hold a judicial enquiry into the legality of the order of the committee or of the commissioner on appeal. His position is akin to that of a Magistrate recovering under the Criminal Procedure Code, a fine passed by another Magistrate. (*Coldstream J.*)

HARI RAM vs. EMPEROR.

38 P.L.R. 4=37 Cr.L.J. 556=1936 Cr. C. 160=162 I.C. 201=A.I.R. 1936 Lah. 144

Sec. 195—Repairing walls of a shed and renewing roof thereon, if amounts to erection.

Under Sec. 195, Punjab Municipal Act, a person is liable to be prosecuted for beginning, erecting or re-erecting a building without sanction. A person who repairs walls of an existing shed and renews the roof thereon cannot be said to have erected a building, for which sanction was required. No prosecution is therefore maintainable in respect of such work. (*Skemp J.*)

NEW DELHI MUNICIPAL COMMITTEE vs. RAM BAI.

38 P.L.R. 886=37 Cr.L.J. 935=1936 Cr. C. 719=164 I.C. 368=A.I.R. 1936 Lah. 702

PUNJAB OPIUM SMOKING ACT (IV OF 1923)

Sec. 5—Three storied house—'chandu' found in third storey—occupants of other storeys not liable.

On raiding a three storied house the Excise Sub-Inspector found accused 5 to 12 sitting in the second storey, and accused nos. 1 to 4 smoking chandu in the third storey.

Held, the accused nos. 1 to 4 could be convicted, but 5 to 12 were innocent, as the presumption in section 5 could not be applied to the occupants of the other two storeys. (*Din Mohammad J.*)

ALI MAHAMMAD vs. EMPEROR.

A.I.R. 1936 Lah. 913

RAILWAYS ACT (IX OF 1890)

Sec. 101—Station master taking reasonable steps to satisfy himself that all points are correctly set—accident resulting due to certain point not having been correctly set—station master if guilty under sec. 101.

According to the rules the station master must be satisfied that the points are correctly set before he allows a train on the loop line. But this does not mean that it is the duty of the station master himself to go and examine the points and see for himself that they are correctly set, before allowing the train to proceed on to the loop line. He has to trust to pointsmen. Where the evidence shows that the station master took reasonable steps to satisfy himself that all the points were correctly set, but an accident results due to a certain point having not been correctly set the station master cannot be held guilty of any offence under sec. 101, Railways Act. (*Thom J.*)

BHAGWAN DAS vs. EMPEROR.

1936 A.W.R. 877=1986 A.L.J. 951=1936 Cr.C. 941=A.I.R. 1936 All. 745

Sec. 108—"Reasonable and sufficient cause," what constitutes—accident due to fault of passenger, if a reasonable ground for pulling the alarm signal.

What constitutes "reasonable and sufficient cause" within the meaning of Sec. 108, Railways Act is a question of fact to be determined according to the circumstances of each particular case. No hard and fast rule can be laid down. A passenger pulling the alarm signal on the occurrence of an accident cannot be said to have acted without reasonable and sufficient cause, even where the accident in question took place through the fault or neglect of the passenger himself. (*Khaja Mohammed Noor J.*)

GAURI SHANKAR SAHAY vs. EMPEROR.

17 P.L.T. 869=1936 Cr. C. 821=165 I. C. 815=A.I.R. 1936 Pat. 499

Sec. 109 & 118—Reservation of compartments for ice-vendor—Persons entering such reserved compartment and refusing to vacate it if guilty.

The Railway authorities have power to reserve a compartment for an ice-vendor for the comfort and convenience of the travelling public. A person who enters such a com-

Railways Act (Contd)

partment and declines to vacate it even on being repeatedly warned that the compartment is reserved, is guilty under Sec. 118, Railways Act, 42 All. 327 referred to. (*Sullaiman, C. J. & Harris, J.*)

DURGA PRASAD vs. EMPEROR.

1936 A.W.R. 196=191 I.C. 17=37 Cr. L.J. 389=1936 Cr.C. 503=1936 A.L.J. 117=A.I.R. 1936 All. 439.

Sec. 120 (b)—*Offence of using abusive language on Railway station.*

It is not illegal for a magistrate to convict a person under Sec. 120 (b) Railways Act, for using abusive language to a person on a Railway Station in a case where the exact words used are not proved (*Allsop, J.*)

RAJARAM vs. EMPEROR.

1936 A.W.R. 195(1)=160 I.C. 1088=37 Cr.L. J. 385=1936 A. L. J. 82=1936 Cr.C. 139=A. I. R. 1936 All. 150

BANGON PREVENTION OF CRIMES (YOUNG OFFENDERS) ACT. (1930)

Secs.—24 & 25—*"Beyond age of 18" meaning of.*

The expression 'beyond the age of 18' must mean and include the period up to the nineteenth birthday of the person concerned. 14 Rang. 327 followed. (*Roberts C. J. Leach and Dunkley J. J.*)

EMPEROR vs. NGA PYU & ANR.

A.I.R. 1936 Rang. 485

REFORMATORY SCHOOLS ACT (VIII OF 1897).

Sec. 8—*Magistrate not specially empowered, if can try a juvenile offender, and send him to the Reformatory School.*

A Magistrate, even if not especially authorised by the Local Government under Sec. 8, Reformatory Schools Act, has jurisdiction to try a juvenile offender, though he may not exercise the power under that section of sending such an offender to a Reformatory School. (*Allsop J.*)

ONKAR NATH & ANR. vs. EMPEROR.

1936 A.W.R. 735=165 I.C. 148=37 Cr. L.J. 1073=1936 A.L.J. 657=1936 Cr.C. 884=A.I.R. 1936 All. 675

Reformatory Schools Act (Contd)

Secs. 35 (2) & 82—*Deed of gift in favour of son by person since deceased—Questions as to whether there are other heirs if within the section—False answers to such questions, if offence.*

Informal questions by the Sub-Registrar as to whether the deceased executant of a deed of gift in favour of a son has left other heirs, are within the contemplation of Sec. 35 (2) of the Registration Act.

Consequently false answers by the son to such questions amount to an offence under Sec. 82 of the Act. (*Cunliffe & Henderson, J.J.*)

ABDUL GAFFUR vs. EMPEROR.

40 G.W.N. 1059=A.I.R. 1935 Cal. 418 165 I.C. 415=37 Cr.L.J. 1151=1936 Cr. C. 665

REVISION

Revision—Period within which application for revision must be presented.

In the Patna High Court, the practice followed in regard to applications for revision, is not to entertain them unless presented within sixty days of the order from which the application is preferred. This rule is only relaxed in cases of special importance when there is special reason to depart from the usual practice. (*Rowland J.*)

BALDEO SINGH vs. MST. DHANA GOALIN.

37 Cr.L.J. 234=1936 Cr. C. 144=A.I.R. 1936 Pat. 109=160 I.C. 152

Statement by prosecution witnesses favourable to accused—defence not making use of such statement during trial—power to use same in High Court in revision.

In a criminal case, two days before the trial opened, the defence obtained a copy of a statement made by a prosecution witness, favourable to the accused, on which the other witnesses might have been questioned. The defence however preferred to keep silent upon the matter and sought to make use of the same before the High Court in its revisional jurisdiction. Held, it was impossible to use the statement at that stage. (*James & Saunders, J.J.*)

HARI MAHTO vs. EMPEROR.

A.I.R. 1938 Pat. 46=160 I.C. 675=1936 Cr.C. 70=37 Cr.L.J. 320

TRADE MARK.**Infringement—Onus of proof.**

Where the accused is charged with having a false trade-mark, the burden is upon him to show that he was not using such mark with intent to defraud. (*Dunkley J.*)

ABDUL SAKUR vs. EMPEROR.

A.I.R. 1936 Rang. 96

Infringement—Matters to be taken into consideration.

In a suit for infringement of trade-mark, the physical resemblance between the two marks must be taken into consideration. The mere fact that one mark may in the market be known under the same name as another is not necessarily a violation of the rights of the owner of the first trade-mark. There must be some inherent similarity in the marks themselves so as to cause violation of the rights of the first mark. (*Dunkley J.*)

ABDUL SAKUR vs. EMPEROR.

A.I.R. 1936 Rang. 96

UNITED PROVINCES EXCISE ACT (IV OF 1910).

Sec. 3(2)—Excise officer—Sub-Inspector of Police, if can be deemed to be an Excise officer.

A Sub-Inspector of Police on whom any of the powers referred to in Sec. 10, Excise Act has been conferred is an Excise officer as defined in Sec. 3 (2) of the Act. (*Niamatullah J.*)

SUNDER vs. EMPEROR.

1936 A.L.J. 577 = 164 I. C. 659 = 37 Cr. L.J. 1018 = 1936 A.W.R. 213

Sec. 40 (2) (k)—Minor in charge of excise shop against rule, if can be held guilty of any offence under the Act.

Where in spite of a rule to the effect that the licensee or persons employed by him shall not put a minor in charge of the drug shop, a minor is actually placed in charge of the shop, the minor cannot be convicted for the breach of the said rule. (*Allsop J.*)

LACHMI SHANKAR vs. EMPEROR.

United Provinces Excise Act (Contd.)

1936 A.L.J. 279 = 1936 A.W.R. 324 = 162 I.C. 899 = 37 Cr.L.J. 719 = 1936 Cr. C. 496 = A.I.R. 1936 All. 372

Sec. 54—House search—"respectable search witnesses,"—meaning of.

If a house-search is required to be conducted in presence of respectable witnesses, respectability does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way, that is, if he is not a thief or a criminal of some kind or a person perhaps of grossly immoral habits (*Allsop J.*)

ASHFAQ vs. EMPEROR.

1936 A.W.R. 781 = 165 I. C. 25 = 37 Cr. L.J. 1108 = 1936 A.L.J. 958 = 1936 Cr. C. 893 = A. I. R. 1936 All. 707

Secs. 73(1) (a). 10 & 3 (2)—Sub-Inspector, on whom any of the powers under Sec. 10 has been conferred, if an excise officer.

A Sub-Inspector on whom any of the powers referred to in Sec. 10, U. P. Excise Act has been conferred is an Excise-officer as defined in Sec. 3 (2) of the Act and a magistrate taking cognisance of an offence on the report of the Sub-Inspector should be deemed to have taken cognisance of the offence on the report of an Excise Officer as required by Sec. 70 of the Act. (*Niamatullah J.*)

SUNDAR vs. EMPEROR.

1936 A.W.R. 213 = 164 I. C. 659 = 37 Cr. L.J. 1018 = 82 = 7936 A.L.J. 577

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916).

Sec. 116—Municipal street encroaching upon private land—accused constructing projections over that part of the street, commits offence thereby.

Where in making a street, the municipality encroached upon the land of a private owner, and the accused constructed certain projections over that part of the street which was on the land of the private owner, held, that the land over which the accused built his projections was no part of a public street or

U. P. Municipalities Act (Contd.)

lawfully under the control of the Board and he could not be convicted of the breach of a municipal byelaw which provided that no person shall build or otherwise encroach upon land which is the property of the Board or which is under the control of the Board unless permission to that effect had been duly granted (*Allsop J.*)

SOHAN LAL vs. EMPEROR,

1936 A.L.J. 48=1936 A.W.R. 110= A. I.R. 1936 All. 192=160 I.C. 445=37 Cr.L.J. 451=1936 Cr.C. 213

Secs. 121 (vii) & 298—*Bye-laws of Municipality requiring person bringing within its limits laden vehicle to toll tax—toll tax, if leviable when vehicle stays outside limits of Municipality.*

Where the bye laws of a Municipality require a person bringing a laden vehicle within its limits to pay toll, then, as soon as a vehicle enters the Municipal limits the act of bringing it is complete and it becomes liable for the tax irrespective of the fact whether the vehicle stays within the limits of the Municipality or not. The word "bring" has no element of 'pause, or 'report'. (*Allsop & Ganganath JJ.*)

EMPEROR vs. HAR DATT.

1936 A.W.R. 840=1936 A.L.J. 962

Sec. 128 (vii)—*Toll tax leviable on laden vehicle—fact that toll tax is to be calculated according to number of passengers if makes tax leviable on passengers.*

Where according to the byelaws of a Municipal Board the toll is leviable not on passengers but on a laden vehicle, the fact that the amount of toll tax has to be calculated according to the number of passengers in the vehicle, does not make the tax leviable on the passengers and the tax remains leviable on the vehicle. (*Allsop & Ganga Nath JJ.*)

EMPEROR vs. HARI DATT.

1936 A.W.R. 840=1936 A.L.J. 962

Secs. 128 (vii) & 298—*Bye laws of Municipality requiring person bringing within its limits a laden vehicle to pay toll tax—toll tax, if leviable when vehicle stays outside limits of Municipality.*

U. P. Municipalities Act (Contd.)

After a tax imposed by a Municipal Board has been notified in the Gazette by the Government, it is not open to anybody to question the validity of the tax on the ground that it is not in accordance with the provisions of the U. P. Municipalities Act. (*Allsop & Ganganath JJ.*)

EMPEROR vs. HAR DATT.

1936 A.W.R. 840=1936 A.L.J. 963

Sec. 155—*Proprietor of firm to which dutiable goods are consigned, if liable.*

The proprietor of firm to which dutiable articles are consigned, is not liable to conviction unless it is shown by evidence that the proprietor of the firm himself introduced or did some act amounting to introduction of goods on which duty should have been paid, (*Niamatullah J.*)

RAMNARAIN SARASWAT vs. EMPEROR.

1936 A.W.R. 104

Sec. 155—*Prosecution for non-payment of octroi—criminal court, if can enquire whether goods were liable to pay the octroi duty.*

In a prosecution under Sec. 155, U. P. Municipalities Act, for no payment of octroi on goods liable to the payment of octroi, the criminal court has jurisdiction to inquire into the question whether the goods imported were actually liable to the payment of octroi, as no offence under the section can be said to have been committed unless the court is satisfied that the goods were in fact liable to octroi duty, and not exempted from it. (*Sulaiman C. J. & Rachhpal Singh J.*)

KASI PROSAD VARMA vs. MUNICIPAL BOARD, BENARES.

57 All. 648

Secs. 186 & 318—*Notice to a person erecting building to demolish the same—Appeal, if lies—Validity of notice, if can be questioned in a Criminal Court.*

If a person erects a building and is ordered by the Municipal Board to demolish it, the order is fairly one under Sec. 186, U. P. Municipalities Act, whether justified or not justified. The question whether such an order was properly

U. P. Municipalities Act (Contd.)

issued is one for the appellate authority under Sec. 318 of the Act and the validity of the order cannot be questioned in a Criminal Court. The only questions which the Criminal Court can decide being whether the order was issued and whether it was complied with. So, if a person to whom a notice is issued under Sec. 186 cannot comply with it, he should appeal under Sec. 318 of the Act and if he does not appeal then it is not open to him to question the validity of the order upon the ground that he was not the proper person to whom it should have been issued or that he was no longer the proper person to carry out the order of the Board. That being so, the point cannot be raised in the Criminal Court that he could not be punished, because, he has sold the building and is no longer in a position to comply with the order. (*Allsop, J.*)

AMBICA PROSAD vs. EMPEROR.

1936 A.L.J. 805=1936 A.W.R. 823
165 I. C. 223=37 Cr. L. J. 1114=1936
Cr.C.889=A.I.R. 1936 All. 693

Sec. 298 H (e) —Bye-law prohibiting prostitutes from residing within a specific area—(exceptions, if can be made.

Where a byelaw was framed by a Municipal Board under Sec. 298H (e); U. P. Municipalities Act, prohibiting prostitutes from residing within a specified area, but there was a proviso to the effect that public prostitutes who owned houses within the said area, could continue to live in such houses for their lifetime, held, that the provision was *ultra vires*, and as such vitiated the main provision deferring prostitutes from residing within the specified area. (*Srivastava & Nanavutty JJ.*)

GANGA PROSAD vs. MUNICIPAL BOARD,

1936 O.W.N. 461=37 Cr. L. J. 574=
1936 Cr.C. 814=A.I.R. 1936 O. 326
=162 I. C. 386

Sec. 299 —Accused convicted for breach of bye-law—Legality of the bye-law, if can be questioned in appellate court when not raised at the time of trial.

Where the accused was convicted under Sec. 299 U.P. Municipalities Act for contra-

U. P. Municipalities Act (Contd.)

vening a bye-law of a Municipal Board and no question as to the legality of the bye-law was raised by him, held, that it was not open to the Sessions Judge to question the authority of the Municipal Board to frame and that of the Commissioner to sanction such a bye-law. (*Nanavutty, J.*)

KARIM vs. EMPEROR.

1936 O.W.N. 220

Sec. 307 —Failure to comply with notice — proceedings under the section, if may be taken.

Where on the failure of the accused to comply with a notice issued by Municipal Board, the Board files a complaint against him under Sec. 307, Municipalities Act, held, that the proceedings were liable to be quashed, as the Board clearly having a remedy in the matter, by way of a civil suit, were not entitled to find a short-cut by getting the accused convicted by Criminal Court. (*Sullaiman C. J. & Collister J.*)

MAIKU vs. EMPEROR.

1936 A.W.R. 36=A.I.R. 1936 All 149=
161 I.C. 316=1936 A.L.J. 205=37 Cr.
L. J. 426(2)=1936 Cr.C. 177

UNITED PROVINCES PREVENTION OF ADULTERATION ACT (IV OF 1912)

Sec. 2 —Public analyst — Meaning of.

The definition of public analyst given in Sec. 2, U. P. Prevention of Adulteration Act includes a person appointed to exercise the powers of a public analyst. (*Sullaiman C. J. & Bennet J.*)

RAMESWAR DAS vs. EMPEROR.

1936 A.W.R. 180=160 I.C. 1026=37
Cr.L.J. 360=1936 A.L.J. 311=1936 Cr.
C. 113(2)=A.I.R. 1936 All. 88

Sec. 4 —Applicability of law of abetment to offence under the section—penalty for abetment of the offence.

Sec. 40, Penal Code, provides that the word "offence" in Sec. 109, Penal Code, denotes a thing punishable under any special or local law as well as a thing punishable under the Penal Code. The law of abetment therefore will apply to Sec. 4, Prevention of Adulteration Act, and as there is no express provision for

U.P. Prevention of Adulteration Act (Contd)

the abatement of this offence, the penalty is the same as the penalty for the offence. (*Bennet J.*)

RAM GOPAL vs. EMPEROR.

1936 A.W.R. 875 = 1936 A.L.J. 1037
= 1936 Cr.C. 1107 = A.I.R. 1936 All. 865

Sec. 4—*Person bringing impure food and selling same in another's shop—offence committed.*

A person who brings impure ghee to the shop of another, a commission agent, and is allowed by the latter to sit in his shop and sell the ghee, is guilty of an offence under Sec. 4 U. P. Prevention of Adulteration Act. The commission agent is guilty of the abatement of that offence, even though the actual selling is not done by him. (*Bennet J.*)

RAMGOPAL vs. EMPEROR,

1936 A.W.R. 875 = 1936 A.L.J. 1037 =
1936 Cr.C. 1107 = A.I.R. 1936 All. 865

Sec. 4—*Person offering milk for sale—Selling skimmed milk—Offence committed.*

Where a customer asks for milk, he should be understood to be desirous of purchasing pure milk and if he is supplied with skimmed milk by the seller, who does not make clear that the milk he supplied, was skimmed milk, he is guilty under the first part of Sec. 4 of the U. P. Prevention of Adulteration Act, 1912. Similarly where a person gives out that milk was for sale at his shop, he should be taken to offer to sell pure milk and not skimmed milk, and if while offering to sell milk, he supplies skimmed milk, he is guilty under the second part of that section. (*Niamatullah J.*)

DUKHI vs. EMPEROR.

1936 A.W.R. 182 (2) = 161 I.C. 356 =
37 Cr.L.J. 453 = 1936 Cr.C. 176 =
A.I.R. 1936 All. 148

Sec. 4(1)(c)—*Burden of proving that the case falls under proviso (c), on whom lies.*

In a prosecution under Sec. 4 (1) of the U. P. Prevention of Adulteration Act, it is for the defence to establish that the case would come under proviso (c) to Sec. 4 (1) by proving that before the sale, the seller

U.P. Prevention of Adulteration Act (Contd)

brought to the notice of the purchaser either by means of a label distinctly and legibly written or printed on or with the article or otherwise the fact that such matter or ingredient had been so added or mixed. (*Sullaiman C. J. & Bennet, J.*)

RAMESWAR DAS vs. EMPEROR.

1936 A.W.R. 180 = A.I.R. 1936 All. 86
160 I.C. 1026 = 8 R.A. 695 = 37 Cr.L.J.
360 = 1936 A.Cr.C. 100 = 1936 Cr.C.
119(2)

Secs. 4(1) & 6—*Absence of label or warranty showing mixture—Provisions of Section, if applicable.*

Where in a case under Sec. 4, Prevention of Adulteration Act for offering or exposing for sale milk mixed with water, there is no label or writing showing the mixture as required under Cl. (c) of Proviso 4 to Sec. 4, nor is there any written warranty about the milk exposed for sale by the accused under the proviso to Sec. 6, the said provisos do not apply at all, and it is not open to the accused to avail of the defence under these provisions. (*Zia- Ul- Hasan, J.*)

EMPEROR vs. BRIJLAL.

1936 O.W.N. 215 = 160 I. C. 489 = 8 R.
O. 263 = 37 Cr.L.J. 408.

UNITED PROVINCES OPIUM SMOKING ACT (2 OF 1925)

Secs. 5 & 6—*Offence if may be tried by Magistrate who had issued search warrant.*

There is no bar to a magistrate's trying a case under the Opium Smoking Act, for the reason that he had taken cognisance of it under the provisions of Sec. 190 (c) Cr. P. C. (*Allsop & Ganganath JJ.*)

EMPEROR vs. BADALWA & ORS.

A. I. R. 1936 All. 689 = 165 I. C. 259 =
37 Cr.L.J. 1121 = 9 R. A. 256 = 1936 A.
Cr. C. 151 = 1936 A.L.J. 1201 = 1936 A.
W.R. 733 = 1936 Cr. C. 885.

Secs. 6, 7 & 9—*Magistrate issuing search warrant under Sec. 9, but subsequently trying case under Secs. 6 & 7—trial, if illegal.*

It is not illegal for a Magistrate who issues a search warrant under Sec. 9, Opium Smoking Act, to subsequently try the accused who are arrested in consequence of the search and are charged with offences under

U.P. Opium Smoking Act (Contd.)

Secs. 6 & 7 of the Act. (*Allsopp & Ganganath JJ.*)

EMPEROR vs. BADALUA & ORS.

1936 A.W.R. 733 = 165 I.C. 259 = 37 Cr. L.J. 1121 = 9 R.A. 256 = 1936 A.Cr.C. 151 = 1936 A.L.J. 1201 = 1936 Cr.C. 885 = A.I.R. 1936 All. 689

UNITED PROVINCES SUGARCANE RULES (1934)

R. 12(4)—*Prosecution of clerk of licensed agent—Necessity for inspector satisfying himself as required by r. 12(4).*

Where on the report of the Inspector, the clerk of a licensed agent was prosecuted under r. 12(1)(b), U. P. Sugarcane Rules, held. on a reference to the Sessions Judge, it was not incumbent on the inspector to satisfy the Court that he the inspector, had satisfied himself as required by r. 22 (4), U. P. Sugarcane Rules. (*Ganganath J.*)

SHEOPUJAN PROSAD vs. EMPEROR.

1936 A.L.J. 206 = 160 I.C. 13 = 37 Cr.L.J. 209 = 1936 A.W.R. 21 = 1936 Cr.C. 1112 = A.I.R. 1936 All. 853

R. 14 *Scope and object of the rule—Necessity of complaint by District Magistrate.*

U.P. Provinces Sugarcane Rules (Contd.)

R. 14 of the U. P. Sugarcane Rules is introduced into the rules to prevent sugar factories from being harassed from frivolous complaint and accusation. It is intended that the District Magistrate should satisfy himself that complaint is not frivolous before he allows it to reach a Court. Accordingly there can be no prosecution unless the District Magistrate has made a complaint, and there can be no prosecution in respect of a charge which is not mentioned in that complaint. (*Allsop, J.*)

RAGHUBAR DAYAL vs. EMPEROR.

1936 A.W.R. 163 = 163 I.C. 250 = 37 Cr.L.J. 782 = 8 R.A. 926 = 1936 A.L.J. 60 = 1936 A.Cr.C. 61 = 1936 Cr.C. 494 = A.I.R. 1936 All. 370

WHIPPING ACT.

Sec. 3—*Sentence of imprisonment if can be passed in addition to sentence of whipping.*

When a sentence of whipping is passed under Sec. 3, Whipping Act, a sentence of imprisonment in respect of the same offence is illegal. (*Agarwalla & Luby JJ.*)

EMPEROR vs. ETWARU DOME & ORS.

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